United States Court of Appeals

for the Second Circuit

APPENDIX

75-7686

United States Court of Appeals

FOR THE SECOND CIRCUIT

B 8/5

IAS. KURZ & Co.,
Owners of the S/S BENNINGTON,

Petitioner-Appellee,

v.

UNION OIL COMPANY OF CALIFORNIA,

Respondent-Appellant.

JOINT APPENDIX

MENDES & MOUNT
Attorneys for Respondent-Appellant
27 William Street
New York, New York 10005
Telephone: 344-7100

KIRLIN, CAMPBELL & KEATING
Attorneys for Petitioner-Appellee
120 Broadway
New York, New York 10005
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PAGINATION AS IN ORIGINAL COPY

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PLAINTIFFS

CHAS KURZ & CO., OWNERS OF THE S.S. WASHINGTON, AND

DEFENDANTS

UNION OIL COMPANY OF CALIFORNIA, DUFFY,

12-8-75

75CV 2764

J.M.P.

CAUSE

ACTION TO CONFIRM ARBITRATION AWARD. 9 U.S.C.

ATTORNEYS

KEMPEL, CAMPBELL & KEATING,
120 BROADWAY,
NEW YORK CITY, N.Y. 10005
732-5520

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75 Civ 2764 CHAS KURZ & CO. OWNERS OF THE S.S. BENNINGTON and UNION OIL COMPANY OF CAL. IN

PROCEEDINGS PG. 2

DATE	NR.	PROCEEDINGS
6-09-75	1	Filed Petition to Confirm arbitration.
6-10-75	2	Filed petitioner's notice of motion for an order to confirm arbitration award. Ret. 06-24-75.
6-10-75	3	Filed memorandum in support of petitioner's petition to confirm arbitration award.
06-20-75	4	Filed respondent's affdvt. and notice of cross-motion for an order to vacate arbitration award.
06-20-75	5	Filed memorandum in support of respondent's cross-motion to vacate or modify arbitration award.
07-07-75	6	Filed respondent's affdvt. of John J. Sullivan in opposition to petitioner's motion to confirm the arbitration award and in reply to petitioner's affdvt. in opposition to respondent's motion to vacate the arbitration award.
07-07-75	7	Filed respondent's reply memorandum in support of the cross-motion to vacate the award.
11-10-75		Filed Memo Endorsed on Notice of Cross-Motion to vacate arbitration Award filed 06-20-75.....The motion to vacate the arbitration award is denied. So Ordered. DUFFY, J (m-n)
11-10-75	8	Filed Petitioner's Reply Affidavit in opposition to the cross-motion of respondent and in support of the petition to confirm the Arbitrator's Award. by Richard H. Sommer.
11-10-75		Filed Memo Endorsed on Notice of Motion to confirm arbitration award filed 06-10-75.....The motion to confirm the arbitration award is granted. So Ordered. DUFFY, J (m-n)
11-18-75	(9)	Filed Counter proposed Order and Judgment # 75,908 confirming arbitration award--ordered that the said arbitration award dated 5-20-75 is confirmed- that the Petitioner recover from Respondent the sum of $695, 395.90 plus interest as indicated amounting in all to the sum of $771,241.63 with interest from the date the judgment is entered until paid. DUFFY, J. Judgment entered 11-18-75, Clerk (m/n)
12-08-75	(10)	Filed security for costs in the sum of $250.00- Seaboard Surety Co.
12-08-75	(11)	Filed respondent's notice of appeal to USCA from the order granting petitioner's motion to confirm the arbitration award entered on 11-10-75 and from the order denying respondent's motion to vacate the arbitration award entered on 11-10-75 and the judgment entered on said orders on 11-18-75. Copy to: Kirlin Campbell & Keating.
12-15-75		Filed letter from Mendes & Mount by John J. Sullivan, to Judge Duffy dated July 8, 1975.

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3A

CHAS, KURZ & CO., Owners of the S.S. BENNINGTON

Petitioner,

and

UNION OIL COMPANY OF CALIFORNIA

Respondent.

75 Civil 2764

NOTICE OF MOTION TO CONFIRM ARBITRATION AWARD

S I R S :

PLEASE TAKE NOTICE that upon the Petition of CHAS. KURZ & CO., filed herein an the Arbitration Award dated May 20, 1975, a copy of which is annexed to the Petition, the undersigned will move this Court in Room 618, United States Court House, Foley Square, New York, New York on the 24th day of June 1975 at 2:15 P. M. or as soon thereafter as counsel may be heard for an order, pursuant to Section 9, United States Arbitration Act (9 U.S. Code §9) confirming the Award dated May 20, 1975 and directing that judgment be entered thereon and granting such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
June 6, 1975

Yours etc.,

KIRLIN, CAMPBELL & KEATING

By: s/ Richard H. Sommer
A Member of the Firm
Attorneys for CHAS KURZ & CO.
Petitioner
Office & P. O. Address
120 Broadway
New York, New York 10005

TO:

MENDES & MOUNT
Attorneys for Respondent
27 William Street
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

4A

CHAS. KURZ & CO., Owners of the S.S. BENNINGTON Petitioner, and UNION OIL COMPANY OF CALIFORNIA Respondent.	75 Civil PETITION TO CONFIRM ARBITRATION AWARD

The Petition of CHAS. KURZ & CO., respectfully states to this Court as follows:

1. Petitioner, pursuant to the provisions of Section 9 of the U.S. Arbitration Act, 9 U.S.C. §9, seeks to confirm an arbitration award relating to disputes which has arisen under a maritime contract.

2. Petitioner owner of the S.S. BENNINGTON entered into a contract of time charter party August 27, 1968, with Respondent, Union Oil Company of California, as charterer. The said time charter party contained an arbitration clause providing for arbitration of any and all differences arising out of the charter party in New Yor before a board of three persons. The said arbitration clause also provided that the decision of any two of the three arbitrators on any point or points shall be final and that judgment could be entered upon any Award made thereunder in any court having jurisdiction. The full text of Clause 49 is attached hereto as Exhibit "A".

3. A dispute arose between the parties concerning Petitioner's claim that while the S.S. BENNINGTON was operating pursuant to the charter, it was damaged by reason of the wrongful direction of the charterers to proceed to an unsafe loading berth and port, at Drift River Terminal, Cook Inlet, Alaska, and that

the said loading platform was not fit and proper place for the safe loading and mooring of the S.S. BENNINGTON, and that the platform's personnel were incompetent and negligent and failed to give proper directions and information as to existing weather conditions, and that the port and loading berth did not have proper aids to navigation, all of which were in breach at the safe port, safe berth warranty of the charter.

Petitioner made demand upon Respondent for arbitration and a panel of three arbitrators was appointed as provided for in the arbitration agreement. On February 5, 1973 attorneys for both Petitioner and Respondent entered into a Submission Agreement, submitting the disputes between the parties to arbitration pursuant to the arbitration agreement contained in the charter party. The said Submission Agreement provided that the decision and Award of Arbitrators, or of any two thereof, shall be final and binding upon the parties hereto and may be made as order of any court of competent jurisdiction. Agreement is attached hereto as Exhibit B.

5. The arbitrators held three hearings, heard two live witnesses, and reviewed the deposition of one other witness as well as numerous documents in evidence. Petitioner and Respondent appeared and participated in the said proceedings. Thereafter, the arbitrators rendered an Award in writing, dated May 20, 1975. A copy thereof is attached hereto as Exhibit C.

6. As disclosed in Exhibit C, a majority of the arbitrators held that there was a violation of the safe Berth Clause in the charter, as a result of the charterer's direction of the vessel to Cook Inlet at Drift River, Alaska in the winter, when it was obvious the vessel would encounter ice and the charterer must have known it, and a breach of the charter by the Respondent, which entitled the Petitioner to recover for the damages inflicted upon its vessel, while it was moored at the loading platform and

upon its return therefrom, plus interest, at the rate of 5% per annum from March 29, 1969 to February 15, 1975. Additionally, the Arbitrators ordered each side to pay its own legal expenses and the cost of the stenographic record is to be divided equally between them. Arbitrators fixed their fees in the amount of $4,000 each, with each party to pay $2,000 to each of the three arbitrators.

7. Petitioner, having been granted an Award against Respondent as aforesaid, seeks confirmation thereof by this Court and entry of judgment thereon.

WHEREFORE, Petitioner respectfully prays, that this Court, pursuant to the provisions of Section 9 of the United States Arbitration Act, enter an Order herein confirming the aforesaid Award of the arbitrators, and that it direct therein that judgment be entered in accordance with said Award.

Petitioner further prays that it be allowed the costs of this proceeding.

Dated: New York, New York
June 6, 1975

CHAS. KURZ & CO.

By: _____
A Member of the Firm
Kirlin, Campbell & Keating
Attorneys for Petitioner
120 Broadway
New York, New York 10005
732-5520

TO:

MENDES & MOUNT
Attorneys for Respondent
27 William Street
New York, New York 10005

DEMISE

45. Nothing herein contained shall be construed as creating a demise of the Vessel to the Charterer.

CLAUSE PARAMOUNT

46. All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder is repugnant to said Act to any extent, such term shall be void to that extent but no further.

BOTH TO BLAME CLAUSE

47. If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Owner in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder shall indemnify the Owner against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Owner. The foregoing provisions shall also apply where the owners, operators or those in charge of any ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

COMMISSION

48. 1¼ per cent commission shall be due by the Vessel and her Owner on all hire as paid under this Charter to Dietze Inc.

ARBITRATION

49. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of LONDON/NEW YORK pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person, with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city above mentioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and judgment may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

Clauses 50 through 63 as attached hereto form part and parcel of this Charter Party.

IN WITNESS WHEREOF, THE PARTIES HAVE CAUSED THIS CHARTER TO BE EXECUTED IN DUPLICATE THE DAY AND YEAR HEREIN FIRST ABOVE WRITTEN.

WITNESS TO SIGNATURE OF
Chas. Kurz

CHAS. KURZ & CO., INC.

WITNESS TO SIGNATURE OF
Loren F. Grandey

UNION OIL COMPANY OF CALIFORNIA

EXHIBIT A

DEL-MAR-TR-82 PRINTED IN U.S.A.

8A

In the Matter of the Arbitration

between

CHAS. KURZ & CO., as Owners of the S.S. BENNINGTON,

and

UNION OIL COMPANY OF CALIFORNIA, as Charterers,

Pursuant to Time Charter Party dated August 27, 1968.

SUBMISSION AGREEMENT.

WHEREAS, a certain Charter Party was entered into between CHAS. KURZ & CO., as Owners of the S.S. BENNINGTON, and UNION OIL COMPANY OF CALIFORNIA, as Charterers, dated August 28, 1968; and

WHEREAS, certain disputes have arisen during the performance of the aforesaid Charter Party, and the aforesaid Charter Party provides that "any and all differences and disputes of whatsoever nature" shall be put to arbitration in the City of New York before a board of three persons; and

WHEREAS, Owners have appointed Arthur E. Ferris, Esq as their Arbitrator, and Charterers have appointed Captain George T. Stam, as their Arbitrator, and the two Arbitrators so named having appointed John M. Reynolds, as the third Arbitrator;

NOW, THEREFORE, the parties hereto agree to submit the following disputes to the above panel for determination, and award:

1. Owners contend and Charterers deny that the vessel BENNINGTON while operating pursuant to the Charter was damaged by reason of the wrongful direction of the Charterers to proceed

73224

EXHIBIT B

to an unsafe loading berth and port, at Drift River Terminal, Cook Inlet, Alaska.

2. Owners contend and Charterers deny that the loading berth and port was unsafe and improper, and the unsafe conditions included among others:

a) The loading platform was not fit and proper for the safe loading and mooring of the S.S. BENNINGTON;

b) Loading platform personnel were incompetent and negligent and failed to give proper directions and information as to existing weather conditions;

c) The port and loading berth did not have proper aids to navigation;

d) Owners reserve their right to claim other deficiencies.

3. Owners contend and Charterers deny that the damages sustained by the vessel Owners, amount to $661,531.00, plus interest.

4. It is understood and agreed that the fees of the Arbitrators and the expenses of the arbitration (including stenographic reporter charges) may, in the discretion of the Arbitrators, be awarded in full against either party or divided between the parties in any proportion the Arbitrators may deem fit.

5. It is further agreed that the decision and award of the Arbitrators, or of any two thereof, shall be final and binding upon the parties hereto and may be made an order of any court of competent jurisdiction.

IN WITNESS WHEREOF, Owners and Charterers have caused this agreement to be signed by their attorneys.

Dated, New York, New York,
February 5, 1973.

CHAS. KURZ & CO.,
By KIRLIN, CAMPBELL & KEATING,
By _____
A Member of the Firm,

UNION OIL COMPANY OF CALIFORNIA,
By HENDES & MOUNT,

By _____
A Member of the Firm.

In the Matter of the Arbitration
between

CHARLES KURZ & COMPANY, Owners

of the

S.S. BENNINGTON

and

UNION OIL COMPANY OF CALIFORNIA, Charterers

AWARD

Arbitrators:

Mr. Ar[illegible] Ferris
Mr. Geo[illegible] T. Stam
Mr. John M. Reynolds, Chairman

Appearances:

Kirlin, Campbell & Keating, Esqs.

Attorneys for Owners
by: Richard H. Sommer and
Harold Higham, of Counsel

Mendes & Mount, Esqs.

Attorneys for Charterers
by: John J. Sullivan and
Frank J. Haley, of Counsel

GENERAL BACKGROUND:

This dispute arose out of a Charter Party dated August 27, 1968 between CHARLES KURZ & CO., Owner of the BENNINGTON, and the UNION OIL CO. OF CALIFORNIA. The Charter was on the Esso Standard Oil Company form "STANDTIME", with a number of additional clauses on a rider, and it provided for twenty-four months' trading and specified in Clause No. 2: "Vessel is to be traded between ports on the U.S. West Coast, including Alaska."

THE DISPUTES:

The dispute specifically involves a sum of $661,567 for ice damage to the vessel in the course of a voyage to and from Drift River in Cook Inlet, Alaska in January of 1969 (vessel actually docked at 0315 on January 15, commenced loading shortly thereafter, and sailed at 2140 on the same day). The platform at which the vessel was docked, known as the CHRISTIE LEE,

EXHIBIT C

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was in its second year of use. It was built and owned by a consortium of oil companies of which UNION OIL was a member. Neither the Captain nor the vessel had ever been to the platform before.

The two clauses in the Charter Party particularly bearing on the dispute are the following:

Clause No. 28 - The cargo or cargoes shall be laden and discharged in any dock, or at any wharf or place that the Charterer or its Agents may direct where the vessel can always be safely afloat.

Clause No. 53 - The vessel shall not be ordered to or bound to enter any icebound port or place or any place where lights, light ships, marks or buoys on vessels arrival are or are likely to be withdrawn by reason of ice or where there is risk that ordinarily the vessel will not be able on account of ice to enter, reach or leave the place. The vessel shall not be obliged to force ice. If on account of ice the Master considers it dangerous to enter or remain at any loading or discharging place for fear of the vessel being frozen in and/or damaged he shall have the liberty to sail to another place or port which is free from ice and there await Charterer's further instructions. The whole of the time occupied from time the vessel is diverted by reason of ice or other conditions until her arrival at an ice-free port as well as any detention by reason of ice or any of the above causes to count on hire but if Master has taken the decision to proceed and any ice damage shall consequently occur, vessel to go off hire during the repair period. Notwithstanding the foregoing, the vessel is not to be diverted to another port, unless Charterer so directs, provided Cook Inlet pilots are agreeable to taking vessel into Nikiski or Drift River, it being understood that Master's judgment shall control as to whether or not vessel proceeds into said Nikiski or Drift River and hire shall not be suspended because of such exercise of Master's judgment not to proceed into Nikiski or Drift River.

Essentially, the Owners base their claim on Clause No. 28, maintaining that the berth at the CHRISTIE LEE platform at Drift River was unsafe. The Charterer based his defense on Clause No. 53, maintaining that the Master should have turned back when he began to encounter ice. The defense did not present any witnesses or evidence.

Other claims which might have been asserted as a result of this incident, such as deadfreight or detention time, were settled by the parties, leaving only the question of liability for the damage to the ship to be decided.

PROCEDURE:

The Panel held three hearings, examined numerous Exhibits, including photographs taken of the vessel in drydock showing damage to the hull and to the propeller, heard testimony from the Master and from a surveyor, and examined a deposition from Capt. William A. Tingley, who was the Drift River pilot involved. This deposition was taken in Anchorage, Alaska, by attorneys representing both parties to the dispute. The Panel also viewed moving pictures taken by the pilot.

ARGUMENTS:

The Charterer took the position that it was not possible to distinguish between ice damage en route to the pier, at the pier, and coming away on the downward voyage.

From the evidence, it was indicated that by the time vessel left Homer Point Station on the afternoon of January 14th it looked as if she would be able to make it. The pilot testified that he had checked the platform at Drift River and received information that there were ice conditions, but that vessel would be able to proceed to the platform, which was 74 miles from the Pilot's Station. The pilot testified that they first began to encounter ice about 35 miles southward from the platform. They reduced speed and followed open leads, but the ice was increasing and the Master contacted the Drift River platform as they approached Harriet Point. They received a favorable report that there was some ice at the platform, but that things looked reasonably good and they went on. It became easier to maneuver when they were above Harriet Point, with the ice less packed, and they were off the platform at the anchorage area shortly before

maximum flood. They saw an opening to dock and tied up starboard side to, heading down river, at about 0315 on the 15th, and loading began almost immediately.

It appears that conditions grew steadily worse while the vessel was at the dock. The down river current forced ice against the vessel with considerable force, both between the vessel and the platform and against the outer side. It was constantly necessary to use the engine to hold the vessel in position, in view of the pressure of the current and the ice, and on more than one occasion loading was interrupted in the hope that conditions would improve. Finally, at 1900 on January 15th the Master decided that it was too dangerous to stay any longer and ordered discontinuance of loading, so that the vessel left the dock at 2140 and proceeded down river with less than a full cargo. She encountered heavy patches of ice on the voyage down river, at no time moving at more than two or three knots. When clear, the vessel proceeded south to Oleum, California, where she discharged her cargo of oil and a preliminary survey was held. She then went in ballast to the plant of the Williamette Iron and Steel Company, Richmond, California, where survey was made and repairs effected.

There was no dispute concerning the amount of damage to the vessel. Charterer maintains that there is no way of telling how much of the damage was incurred while en route to the loading pier in Drift River, while at the pier, and while proceeding down river again. It should be mentioned that, when they were well into ice on the way up, the Master considered that perhaps they should turn back. He conferred with the pilot and he called the loading platform. They told him that as far as they could see by searchlight, it was fairly clear at the platform and they could not see any ice. He conferred with the pilot and, as it was practically clear at that time, they decided it was better

to go on up to the platform rather than turn around and go back to the ice flow they had already traversed.

The pilot's testimony was taken in Alaska and his deposition was received and read by the Panel. He testified that:

(1) Before boarding the vessel he, or his office, checked conditions with Drift River platform and they were told there were ice conditions at and around the platform but it was indicated they would be able to proceed.

(2) The ice conditions on the morning floodtide were "as bad as I had seen up to this time."

(3) The ice conditions on the way out were much heavier than coming in, especially in Harriet Point area.

(4) "The ice conditions were "always different."

Q: Would it have done any good for you to have flown up to the platofrm and looked at the ice conditions before you got aboard?

A: It would have done good. I would have a full knowledge at that time, but it would require eleven to twelve hours to get the ship up there and then you have a different condition altogether."

(5) There are occasions in Drift River when everything is clear - "no ice around platform - beautiful, and the rest of the inlet is chock-a-block full (of ice). This is something you can't predict." Cook Inlet is constantly changing. "Things are bad, we're just about to the end of our rope and zoom, in three or four days it's almot like summer."

(6) He stated there were no structures at Drift River implanted in the bottom or around the platform to protect vessels from ice by responding "at this time? at the time of the Bennington episode, nothing."

He described the ice conditions on the entire trip as "the worst I had seen up to that time. Bearing in mind that this was only the second winter of operation and the first winter was comparitively mild we were all finding things out during this time."

15A

AWARD:

The majority of the Panel feel that there was a violation of the Safe Berth Clause in the Charter Party. It was obvious that a steamer would encounter ice proceeding up Cook Inlet to Drift River in the winter and the Charterers must have known it. The majority of the Panel does not agree with the Charterers' position that Clause No. 53 meant the Master should have turned back. Everyone knew she would encounter some ice if she was sent to Drift River in January. While not relieving the Master's judgment of its control of the matter, the majority of the Panel feel that the wording in Clause No. 53 implies that vessel is to go through ice if it seems practical, and that whether or not the Cook Inlet's pilots are agreeable to taking the vessel to Drift River is important. The pilot has testified that he was agreeable. The majority of the Panel also feel that, after consideration of the testimony, pictures, etc. most of the damage occured while the vessel was being battered at the dock and during the outward voyage. The more heavily laden, the greater the damage to be caused. However, the Panel proposes to reduce Owner's claim by 10% to allow for some damage en route up river to the dock.

The Charterer makes much of a point of the failure of the Owner to give the Master a copy of the Charter Party, so that the Master did not know what the contractual provisions were that covered the voyage. The Master, not having a copy of the Charter, simply assumed that as Master he had control of the ship and could refuse to go up to the platform or could turn around and go back at any time in his judgment that he thought it was proper. While the failure to furnish him with the pertinent provisions of the Charter is indeed surprising.

the majority of the Panel feel that his actions would not have been different if he had received a copy of the Charter provisions and that, in fact, he might well have been even more impelled to go on up because the pilot was agreeable to do so.

The Panel received no evidence as to any changes that may have been made in the terminal since this incident in January, 1969, and the majority of the Panel therefore only finds that this berth was, at that time, unsafe.

The majority feel that the Charterer is not relieved of legal responsibility for the consequences of his Breach of Contract (sending vessel to an unsafe berth) "unless the course followed by the Captain is so imprudent that it can fairly be said to be an intervening act of negligence." The pilot testified that "the master did everything one could expect" and the majority fully agree with this assessment.

Under the circumstances, the majority of the Panel award the Owner his claim of $661,551 less 10%, giving a net of $595,395.90. In addition, the Panel awards the Owner interest on this sum at 5% per annum (this taking into consideration varying interest rates since time of the incident until now) from March 21, 1969 to February 15, 1975.

DISSENT:

Captain Stam dissents from the majority decision, believing that the Ice Clause No. 53 shields the Charterers completely from liability, that had the Master a copy of the Charter Party, upon encountering ice he would and should have refused to proceed further while seeking instructions from the Charterer.

SUMMARY:

Each side will pay their own legal expenses and cost of the stenographic record will be equally divided between them.

Arbitrators set their fees at $4,000 for each arbitrator, each of the two parties to the dispute to pay the sum of $2,000 to each of the three arbitrators.

Arthur Ferris

George T. Stam
"IN DISSENT"

John M. Reynolds
Chairman

New York, N. Y.
May 20, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

18A

CHAS, KURZ & CO., Owners of the S.S. BENNINGTON

Petitioner,

and

UNION OIL COMPANY OF CALIFORNIA

Respondent

75 Civil 2764 (MED)

NOTICE OF CROSS-MOTION TO VACATE ARBITRATION AWARD

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of John J. Sullivan and upon all the proceedings heretofore had herein, the undersigned will make a cross-motion to this Court in Room 618, United States Court House, Foley Square, New York, New York on the 24th day of June, 1975 at 2:15 P.M. or as soon thereafter as counsel may be heard for an order, pursuant to Sections 10, 11 and 12, United States Arbitration Act (9 U.S. Code) Sections 10, 11 and 12 to vacate or modify the award herein, and staying the proceedings of Petitioner to enforce the award, and granting such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
June 19, 1975

Yours, etc.,

MENDES & MOUNT

By John J. Sullivan
A Member of the Firm
Attorneys for UNION OIL COMPANY OF CALIFORNIA, Respondent
Office & P. O. Address
27 William Street
New York, New York 10005

TO:
KIRLIN, CAMPBELL & KEATING
Attorneys for Petitioner
120 Broadway
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHAS. KURZ & CO., Owners of the S/S BENNINGTON,

Petitioner,

and

UNION OIL COMPANY OF CALIFORNIA,

Respondent.

75 Civil 2764 (KTD)

AFFIDAVIT

JOHN J. SULLIVAN, being duly sworn, deposes and says he is a member of the firm of Mendes & Mount, attorneys for respondent Union Oil Company of California, and is familiar with the proceedings heretofore had herein.

This affidavit is submitted in support of a cross-motion to vacate an arbitration award in favor of petitioner, Chas. Kurz & Co., owners of the S/S BENNINGTON, against charterers, Union Oil Company of California, in the sum of $595,395.90 plus interest on that sum at 5% per annum from March 21, 1969 to February 15, 1975, (Award, Exhibit I annexed hereto), and to stay the proceedings of petitioner to enforce the award.

The dispute, that is the subject of this arbitration, arose out of a charter party dated August 27, 1960 between Chas. Kurz & Co., owner of the BENNINGTON, and the Union Oil Company of California, (Award, p. 1), and involved a claim for $661,567 ice damage to the BENNINGTON while that vessel was under charter to respondent.

In January, 1969, the master, Capt. Claude L. Williamson, was directed by the owner's agents to proceed to the Cook Inlet Pipeline Company Terminal at Drift River, Alaska for a shipment of crude oil. The BENNINGTON proceeded from Portland, Oregon to Homer, Alaska, where it arrived on January 14, 1969. The pilot, Capt. William A. Tingley, boarded the BENNINGTON at the Homer

pilot station, which is 74 miles from the Drift River Terminal. At the time, there were ice conditions prevailing in Cook Inlet and in the area of Drift River. After proceeding approximately 25 miles from Homer, the vessel encountered drift ice and at approximately 50 miles from Homer, the vessel encountered very heavy ice, and sustained various damages while proceeding through ice to the terminal.

On January 15, 1969, at 0011, the BENNINGTON arrived off the loading platform, with ice conditions remaining constant right up to the time the vessel docked. The vessel remained at the loading platform during three changes of tide, during which time it remained exposed to the continuing heavy ice conditions. Ultimately the master discontinued loading and proceeded back to Homer, again under heavy ice conditions.

Claim was made for $661,551 ice damage sustained on the voyage to the terminal, at the terminal, and on the voyage from the terminal.

The owners based "their claim on Clause No. 28, (Safe Berth Clause) maintaining that the berth of the Christie Lee platform at Drift River was unsafe", (Award, p. 2). That Clause provides:

> "The cargo or cargoes shall be laden and discharged in any dock, or at any wharf or place that the Charterer or its Agents may direct where the vessel can always be safely afloat."

The charterer "based his defense on Clause No. 53", (the Ice Clause), (Award, p. 2). That Clause provides:

> "The vessel shall not be ordered to or bound to enter any icebound port or place or any place where lights, lightships, marks or buoys on vessels arrival are or are likely to be withdrawn by reason of ice or where there is risk that ordinarily the vessel will not be able on account of ice to enter, reach or leave the place. The vessel shall not be obliged to force ice. If on account of ice the Master considers it dangerous to enter or remain at any loading or discharging place for fear of the vessel being frozen in and/or

> damaged he shall have the liberty to sail to another place or port which is free from ice and there await Charterer's further instructions. The whole of the time occupied from time the vessel is diverted by reason of ice or other conditions until her arrival at an ice-free port as well as any detention by reason of ice or any of the above causes to count on hire but if Master has taken the decision to proceed and any ice damage shall consequently occur, vessel to go off hire during the repair period. Notwithstanding the foregoing, the vessel is not to be diverted to another port, unless Charterer so directs, provided Cook Inlet pilots are agreeable to taking vessel into Nikiski or Drift River, it being understood that Master's judgment shall control as to whether or not vessel proceeds into said Nikiski or Drift River and hire shall not be suspended because of such exercise of Master's judgment not to proceed into Nikiski or Drift River."

The award notes "the defense did not present any witnesses or evidence". Charterers considered the testimony of owner's witnesses and the evidence submitted by owner more than sustained their defense.

The majority of arbitrators held the owners entitled to a recovery of $595,335.90 plus interest. The award is confusing and has been snipped away to produce a result that is without continuity or reason. Under the caption "Arguments", it is stated "the charterer took the position that it was not possible to distinguish between ice damage on route to the pier, at the pier, and coming away on the downward voyage, (Award, p. 3), and then makes no further reference to the "arguments", but goes on for 2-1/2 pages stating what was "indicated from the evidence", (Award, pp. 3-5). Neither "arguments" nor "evidence" were completely set forth. Sentences are incomplete, and there are misstatements and omissions.

Nevertheless, there do emerge points that stand out, and warrant vacating the award:

1. The arbitration panel exceeded its authority in rendering an award after the time provided for under the applicable rules had expired.

2. The majority of arbitrators exceeded their authority in granting a recovery for ice damages where there is no liability.

3. The majority of arbitrators exceeded their powers in finding liability while admitting the factual basis for such liability was not present.

4. The majority of arbitrators exceeded their powers in finding liability for the presence of a condition within the contemplation of the parties.

5. The Chairman of the Arbitration Panel failed to disclose a fact that should have been made known.

6. Arbitrators have implied terms to the Charter Party at complete variance with the provisions contained therein.

7. Charterer has been foreclosed from meeting an issue raised by arbitrators implying charter party conditions.

1. The arbitration panel exceeded its authority in rendering an award after the time required under the Rules applicable to these proceedings.

The present arbitration proceedings were conducted, pursuant to the proposal by the Chairman of the arbitration panel, under the Rules of the Society of Maritime Arbitrators, Inc., August 9, 1973 Hearing, p. 3). Section 32 of these Rules provides as follows:

> "Section 32. Time - The Arbitrator(s) shall render his or their Award as expeditiously as possible but in no case later than 90 days from the receipt by Arbitrators of the last evidence, transcript or brief, whichever shall be the last received." (Exhibit II annexed hereto.)

Following the conclusion of the arbitration hearings, briefs and answering briefs were submitted to the panel, with the answering brief being submitted on or about February 25, 1975. There was a further exchange of letters between counsel, but no further

"evidence, transcript or brief" was requested by the panel or submitted.

By letter dated April 22, 1975, the Chairman advised counsel that Mr. George T. Stam, arbitrator nominated by the charterers was ill, as follows:

> "The Panel has set noon time on April 29th for a conference in an effort to settle the above case. Unfortunately, George Stam is now in the hospital with a kidney ailment. There is a very slight chance of his being out on the date of the conference in the process of transferring from the Westchester Hospital to a New York hospital. However, if he is unable to make that date, there may well be a very extended delay, so that we request both counsel to waive the time provision in the Rules of the Society.
>
> If such an extended delay does eventuate, will you gentlemen wish Mr. Ferris and myself to get together to discuss the case without Mr. Stam at that time in case it should happen that Mr. Ferris and I are in accord anyway?
>
> Please advise me or Mrs. Feldman in this office promptly on that point." (Exhibit III annexed hereto.)

Deponant was surprised the latter suggestion would be proposed, and declined, but was prepared to waive the time limitation in accordance with the suggestion contained in Mr. Reynolds' letter, namely that if Mr. Stam "is unable to make that date, there may well be a very extended delay, so that we request both counsel to waive the time provision in the Rules of the Society". On April 23, 1975, deponant advised arbitrators, as follows:

> "Reference is made to Mr. Reynolds' letter of April 22nd concerning the arbitration in the captioned matter. We are sorry to hear of Captain Stam's illness, and are prepared to waive the time provision in The Rules of the Society.
>
> We believe it preferable that the panel have the benefit of all arbitrators' views and comments in arriving at a conclusion on the issues presented and, as such, request that the panel's deliberations be deferred until Captain Stam is able to attend." (Exhibit IV annexed hereto.)

Deponant heard nothing further, and considered the meeting of arbitrators had been deferred pending Mr. Stam's recovery. However, the next development was when the arbitrators' award, dated May 20, 1975, was rendered to deponant by a letter from the Chairman dated June 3, 1975, (Exhibit V, annexed hereto.)

Deponant thereafter ascertained that the panel had, in fact, met on the date scheduled, April 29, 1975, well before the 90 day time limit has expired. The circumstance, (i.e., the anticipated inability of Mr. Stam to meet with the other arbitrators on April 29th because of his illness), under which deponant was prepared to waive the time limit was no factor and, accordingly, the time limit was not waived.

As such, the panel has failed to comply with the conditions governing the arbitration, and arbitrators exceeded their authority in rendering an award more than 90 days after the receipt by arbitrators of the last "evidence, transcript or brief".

2. The majority of arbitrators exceeded their authority in granting a recovery for ice damages where there is no liability.

The Safe Berth Clause of the charter party provides:

> "The cargo or cargoes shall be laden and discharged at any dock, or at any wharf or place that the charterer or its agents may direct where the vessel can always be safely afloat."

The holding of the arbitrators is that "the majority of the panel feel that there was a violation of the Safe Berth Clause in the charter party", and "the majority of the panel therefore only finds that this berth was, at that time, unsafe". There are thereby defined limits of charterers liability to those damages resulting from an unsafe berth.

No charter provision as to a "safe port" is stated in the charter party, and the award applies the distinction between a "safe port" and "safe berth" provision by reducing "owner's claim by 10% to allow for some damage on route up river to the dock", (Award, p. 6). The difference is pointed up in an article

by the Chairman of this panel, (The Concept of Safe Ports, by John M. Reynolds, Lloyd's Maritime and Commercial Law Quarterly, August 1974), wherein it is stated:

> "The question of determining whether a certain port was 'safe' for a particular ship, under a specified charter-party, at a particular time and under the circumstances then prevailing, can be one of the most difficult and thought-provoking problems that a panel of arbitrators can be called upon to decide. What is a safe port? For what type of ship is it safe? When and under what conditions is it safe? One port may be safe for smaller vessels, but not for larger ones. A port ordinarily acknowledged as safe may be unsafe at a particular time, perhaps if a violent hurricane is known to be bearing directly down upon it.
>
> The above questions equally apply to the matter of a safe berth, a warranty frequently included in the same charter which specifies that a safe port is to be designated."
>
> * * *
>
> "Some attempts at definition would appear to be in order at this point. 'Webster's Unabridged Dictionary' gives the following:
>
> 'PORT -- A place to which vessels may report for purposes of commerce, especially to discharge or receive their cargoes. In this sense, the word varies in its significance with the content. It normally refers to a haven or harbor, but may be used to denote any place to or from which merchandise may be shipped, as a mere landing place.'
>
> Also, since we have pointed out that the question of the safety of a berth is frequently involved in similar disputes, we turn to Webster again:
>
> 'BERTH -- The place where a ship lies, when at anchor or at a wharf.'
>
> Defining a safe port is not as easy. An excellent brief definition was that given by Dr. S. Mankabady in his talk before the Second International Congress of Maritime Arbitrators in Athens:
>
> 'One common definition of a safe port is that it is one that will be safe for a particular ship to proceed, lie always safely afloat while loading or discharging, and safely depart.'"

Nevertheless, having found the charterer liable for failure to furnish a safe berth, and disallowing owner's claim for ice conditions away from the berth on the inward voyage, the panel held that "most of the damage occurred while the vessel was being battered at the dock and during the outward voyage", (Emphasis added)(Award, p. 6), and allowed a recovery for all of such damage.

The "outward voyage" had nothing to do with conditions at the berth. The ice damage sustained on the "outward voyage" was sustained in the same port where the "inward voyage" took place, and where damages were disallowed. It is not a situation involving a failure to give a reason for an award. The reason is given -- violation of the Safe Berth Clause --, and it is an act far in excess of the arbitrators' power to grant an award for damages or the outward voyage, where there is no liability and no liability has been stated.

3. The majority of arbitrators exceeded their powers in finding liability, while admitting the factual basis for such liability was not present.

Arbitrators' holding is a legal conclusion that "a violation of the Safe Berth Clause of the charter party" gives rise to charterers liability, (Award, p. 6), and having so held, casually discount the absence of facts to support such conclusion, namely knowledge by the master of the "Safe Berth" warranty, and reliance on such warranty. Owner's witness, Capt. Claude L. Williamson, master of the BENNINGTON, testified:

> "Q. Did you have a copy of the charter party?
>
> A. No, sir, I did not have a copy of it.
>
> Q. Were you familiar with the term of the charter party?
>
> A. Not particularly. I had read copies of charter parties but I was not familiar with that particular one as I did not have a copy. (Transcript of December 17, 1974 Hearing, p. 88).

It is one thing to misstate, not state, or ignore testimony or evidence in the record upon which an award is based. It is quite another to acknowledge the facts supporting the legal proposition

upon which liability is based simply aren't present:

> "The charterer makes much of a point of the failure of the owner to give the master a copy of the charter party, so that the master did not know what the contractual provisions were that covered the voyage . . . While the failure to furnish him with pertinent provisions of the charter is indeed surprising, the majority of the panel feel that his actions would not have been different if he had received a copy of the charter provisions . . . " (Emphasis added)(Award, pp. 6 & 7).

For the arbitrators to base a conclusion as to liability, and then blandly discount the absence of facts to support such conclusion, is no simply misinterpretation or misstatement of the law, and for arbitrators then to speculate what they "feel" the master's actions would have been if he had known the terms is patently unreasonable. The arbitrators may not dispense their own brand of justice, and their conclusion represents a manifest disregard of the law.

4. The majority of arbitrators exceeded their powers in finding liability for the absence of a condition within the contemplation of the parties.

In the J. G. Grammer (WDNY) 1930 AMC 952, the court stated, at page 957:

> "The lateness of the season permits the inference that the contracting parties were aware of the possible difficulties and perils which might retard and prevent prompt delivery, or even stop delivery before the ensuing spring. It was not unusual to enter into similar contracts for down-bound transportation in early December. A like situation presented itself the previous winter at the Soo, and the risks, uncertainties, and probabilities from freezing up of channels doubtless were in the minds of the parties at the time of chartering the Grammer." (Emphasis added).

Consistent with that premise is the panel's holding that "It was obvious that a steamer would encounter ice proceeding up Cook Inlet to Drift River in the winter . . . " and "Everyone knew she would encounter some ice if she was sent to Drift River in January", (Award, p. 6).

In Braithwaite v. Power, 1 N.D. 455, 48 N.W. 354, the court ruled that a transportation on water on the verge of winter

must be understood to be subject to hazards and delays resulting from the close of navigation, where nothing is shown to the contrary in the contract.

For the arbitrators to acknowledge the proposition that "everyone knew she would encounter some ice", and then, in a complete reversal, hold charterer liable because there was ice is a manifest disregard of the law.

Ice was present at Drift River, and the BENNINGTON was thereby potentially exposed to a peril, no less than fog, a storm, or any other marine hazard, to which the parties understood the voyage was subject, and where, having encountered such hazard, the Ice Clause of the charter party clearly spelled out the protection afforded to the owner.

"It was obvious the steamer would encounter ice," (Award, p. 6). In Horn & Christensen Canadian Enterprises, (1971 AMC 362, it is noted at page 365:

> ". . . not even the safest port in the world is necessarily completely safe all the time. Major ports can become temporarily unsafe, as a result of storms and hurricanes, tidal waves and other acts of God. This does not, per se, make it unsafe or entitle that label at any given moment.
>
> * * *
>
> The temporary and occasional problem of rising wind is a foreseeable hazard requiring prudence and in extreme cases the premature sailing of the vessel to a sheltered anchor to ride out the weather.
>
> * * *
>
> . . . any damage caused to the STADT SCHLESWIG in Grindstone was brought about by an imprudent decision of the Master (who was not over experienced with the port), in not proceeding to the anchorage as soon as the wind started to freshen."

Having properly and correctly acknowledged the proposition that "everyone knew she would encounter some ice", arbitrators deliberately ignored this in holding charterer liable when ice was, in fact, present. This is not a mere error in the law or a failure to understand or apply the law, but a patent dis-

regard of the law.

5. The Chairman of the arbitration panel failed to disclose a fact that should have been made known.

The arbitration proceedings were conducted under the Rules For The Society of Maritime Arbitrators Inc., (Transcript of August 9, 1973 Hearing, p. 3).

> "Section 8. Disqualification - No person shall serve as an Arbitrator if he has any financial or personal interest in the result of the arbitration nor if he has acquired detailed prior knowledge of the dispute.
>
> Section 9. Disclosure By Arbitrator(s) of Disqualifying Circumstances - Preferably at the time of receiving his notice of appointment, but no later than the commencement of the first hearing, a prospective Arbitrator is required to disclose any circumstance tending to raise a presumption of bias or which he believes might disqualify him as an impartial Arbitrator . . . " (Emphasis added) (Exhibit II).

On August 9, 1973, at the outset of the arbitration hearings in the present matter, Mr. Reynolds, Chairman of the panel, made the following statement of disclosure:

> "MR. REYNOLDS: I declare the Hearing open. First of all, I think we had better cover the fact that a recent ruling in the Supreme Court upset an arbitration because one of the arbitrators has substantial business dealings with one of the disputing parties. I have been in this business over 30 years, but to the best of my knowledge, to the best of my knowledge, I have no dealings with either parties. I stand to be challenged." (Transcript, August 9, 1973, p. 2).

However, Mr. Reynolds had served as an arbitrator in another dispute between a vessel owner and a charterer on a claim, which on information and belief, involved the same Drift River Terminal at which the DENNINGTON loaded in the present dispute, (The ACHILLES, 72 AMC 1870; 73 AMC 666).

This fact was not known to deponant, and is a factor that should properly have been disclosed to deponant.

It is inescapable that the arbitrator would bring preconceived notions to the present arbitration. In the ACHILLES arbitration, Mr. Reynolds held against the charterers, although in the present arbitration, the thrust of the claim was directed to the ice conditions present at Cook Inlet, and consideration of

the structural characteristics at the loading platform were perfunctory. In 251 pages of testimony, these received only passing reference. Capt. Tingley's testimony was that there were "adequate fenders on the platform", (Tingley, p. 19, l. 22). Nevertheless, the award laid particular stress on the rather obscure comment made in the testimony, stating:

> "He stated there were no structures at Drift River implanted in the bottom or around the platform to protect vessels from ice by responding "at this time? At the time of the BENNINGTON episode, nothing", (Award, p. 5),

and apparently seeking to distinguish its finding on the basis of this from factual situation not appearing in the record, concluded:

> "The panel received no evidence as to any changes that may have been made in the terminal since this incident in January, 1969, and the majority of the panel therefore only finds that this berth was, at that time, unsafe", (Award, p. 7).

There is the distinct possibility that, in considering the testimony and evidence in the present matter, it would be difficult for Mr. Reynolds not to go outside the record and relate to the other arbitration.

The presence of Mr. Reynolds on the panel in the ACHILLES arbitration is surely a situation where Mr. Reynolds would be in a position to acquire 'detailed prior knowledge' of conditions relating to the dispute, and which, consciously or unconsciously, could prove to be persuasive in consideration of the issues in the present matter. The fact should have been made known to deponant.

6. Arbitrators have implied terms to the charter party at complete variance with the provisions contained therein.

It is within the province of arbitrators to pass upon the obligations of the respective parties based on the terms of the charter party. The majority of arbitrators note that "This dispute arose out of a charter party dated August 27, 1968", (Award, p. 1), and that "charterer based his defense on Clause No. 22", (Award,

It is quite another matter, however, and clearly in excess of the arbitrators' power to move beyond the terms of the contract and impose their standards by implying qualifications to the contract terms distinct from and at complete variance with the clear unambiguous provision under consideration.

It is not a question of interpretation, but of distortion, and one that is critical to charterer's defense.

The Ice Clause of the charter party, (Clause 53), provides in part:

> ". . . it being understood that master's judgment shall control as to whether or not vessel proceeds into Nikiski or Drift River and hire shall not be suspended because of such exercise of master's judgment not to proceed into Nikisiki or Drift River." (Emphasis added.)

In considering charter party Clause 53, (the Ice Clause) arbitrators confirm they are "not relieving the master's judgment of its control of the matter", (Award, p. 6), and then promptly proceed to do so by injecting an implication in direct contravention of the proposition stated:

> "While not relieving the Master's judgment of its control of the matter, the majority of the panel feel that the wording in Clause No. 53 implies that the vessel is to go through ice if it seems practical . . . " (Award, p. 6).

In confirming they are "not relieving the master's judgment of its control, arbitrators correctly state, and disclose an understanding of the law governing the rights and duties of the master under the terms of the charter party.

In a New York arbitration, The Advance-The Parma, 1956 AMC 1776, a claim arose out of directions to the vessel to load cargo for discharge in the St. Lawrence River, with an expected arrival in the St. Lawrence during the month of December. The arbitrators noted:

"It is a well known fact that the St. Lawrence is subject to ice conditions during the winter months, and such ice conditions could prevail as early as November or any time thereafter during the winter months; any experienced master should be aware of these conditions.

The master of The Advance, on receiving charterer's orders, had two courses open to him; first to refuse to proceed on the voyage due to the uncertain conditions insofar as ice was concerned; or, to accept the voyage by making an agreement with his charterers that should his vessel suffer damages from ice, they would remain responsible for such damages. The master, however, did not take advantage of any of these alternatives, but proceeded on the voyage, as instructed by the charterers, without any protest. During the course of the voyage, including a stay at Quebec, and on the southbound voyage, vessel received certain ice damages." (Emphasis added.)

In the case of the steamship PARMA, claim was made for ice damage on a voyage to the Bay of Fundy. The arbitrators noted that in the Bay of Fundy "the formation of ice . . . takes place, and floating ice is very prevalent, posing a definite risk to navigation". Again, the arbitrators noted:

"The master of the Parma could have brought this matter to Charterers' attention, and again, here making agreement that for any ice damages suffered by his vessel, he would hold charterers responsible. He also, however, did not take any advantage of his charter conditions, and proceeded to loading port . . . in ballast, without any protest. While in the course of trying to reach Hantsport, he encountered broken ice and bad weather conditions, which made it risky for him to reach the port of Hantsport. Only then, did he protest to Charterers that he would hold them responsible for ice damages, if any, but he did not get Charterers' agreement that they would pay for such ice damages. Failing to get such an agreement, then to notify Charterers that he would abandon the voyage and wait their further instructions at a safe place.

Regardless of the foregoing, the Master persisted in going through ice to make Hantsport which he finally did. His vessel also received certain ice damages.

It is the opinion of the Arbitrators that the Masters of these vessels did not exercise due diligence and precaution in assuming the risk of proceeding on these voyages without due regard to the two clauses in the charter parties referred to above, and in so doing, voided any claims for ice damages with no recourse of Charterers." (Emphasis added.)

Further, the proposition is supported by the facts. The vessel did encounter ice, and the master's judgment did control. At approximately 50 miles from Homer, the "vessel encountered very heavy drift ice", and remained in ice in proceeding to the loading platform, while at the platform, and returning from the platform, sustaining damage all the way.

Nevertheless, arbitrators, having confirmed they are "not relieving the master's judgment of its control of the matter", proceed to "feel that the wording in Clause No. 53 implies that the vessel is to go through ice if it seem practical . . . ", (Award, p. 6)(Emphasis added.) This is not what the charter party says. The charter party provides the "Master's judgment shall control" without qualification. This if for the owner's protection. The provision does not say "The master's judgment shall control when the vessel is to go through ice if it seems practical" -- or "impractical".

It is clearly improper for arbitrators to "imply" a condition that completely distorts the explicit terms of the charter party, and on the basis of the provision implied, deprive charterer of its charter party defenses. Arbitrators are limited to the interpretation of the contract before them, and in implying conditions to vary its terms, are dispensing their own brand of justice.

7. Charterer has been foreclosed from raising an issue raised by arbitrators involving charter party conditions.

Arbitrators state that:

> "While not relieving the Master's judgment of its control of the matter, the majority of the panel feel that the wording in Clause No. 53 implies that vessel is to go through ice if it seems practical..." (Award, p. 6), (Emphasis added)

By injecting, ex post facto, an issue created by implication as to whether it "seemed practical" for the vessel to proceed, charterer has been deprived of an opportunity to offer arguments or submit a brief directed to this issue for arbitrators' consideration. On the basis of the record, a strong argument could be made that it was not "practical" for the vessel to proceed.

On the testimony of the pilot, Capt. William A. Tingley, and the master, Captain Claude L. Williamson, both of whom were called as witnesses by the owner, and the exhibits, all of which were offered by the owner, it was established that at the time the pilot boarded the BENNINGTON, there were ice conditions prevailing in Cook Inlet and in the area of Drift River, (Tingley, p. 6, ll. 23-25: p. 7, l. 1). Before boarding the BENNINGTON, Capt. Tingley had checked with the Drift River platform, (Tingley, p. 7, ll. 2-6), and on boarding, "analyzed" the information received with the Master, (Tingley, p. 36, ll. 8-10). Capt. Tingley noted that the loading platform personnel admittedly "are not seagoing men" - their function is "tying the ship up, observing the ice around the platform, getting the ship loaded", (Tingley, p. 36, ll. 16-18). They simply advise that they see from the platform, (Tingley, p. 36, ll. 8-10), and the vessel, with its "experience, should be able to analyze" the information received, (Tingley, p. 36, ll. 18-24).

The information received by Capt. Tingley as to conditions at the loading platform was that there were ice conditions in and around the loading platform, (Tingley, p. 7, ll. 7-9), and "there is ice everywhere, a little open water showing", (Tingley, p. 40, ll. 9-12). This information related to conditions as far as could be seen from the platform, and did not apply to expected heavy concentrations away from the loading platform, (Tingley, p. 53, ll. 10-18).

There was "no criticism whatsoever of the information received from the platform", (Tingley, p. 54, ll. 6-8), and the information received from the platform, as to conditions present at a given time, would not hold true at a subsequent time, (Tingley, p. 39, ll. 17-20).

Capt. Tingley notified the Captain "prior to ever getting in the area between Harriet Pt. and Calgin Island, that we would have tough sledding in that area. He could expect this. This is a known fact and I wanted him to be well aware of it . . . I informed him that we could expect heavy concentration in there", (Tingley, p. 63, l. 25 p. 64, l. 4, ll. 8-10). After proceeding "approximately 25 miles from Homer, the vessel encountered drift ice, (Exhibit 17), "at 4:30 . . 1630 on the 14th", (Tingley, p. 60, ll. 6, 7).

Capt. Tingley "consulted the Master as we approached Harriet Point. Inquired of him if he would contact the Drift River platform", (Tingley, p. 14, ll. 24, 25), and the Captain did, in fact, talk to the platform when we were south of the Harriet Point area, (Tingley, p. 49, ll. 7, 8).

At approximately 50 miles from Homer, the "Vessel encountered very heavy drift ice", (Exhibit 17) with "few leads", (Exhibit 2), i.e., "few patches of open water", (Tingley, p. 60, l. 12).

The ultimate decision to proceed in was solely that of the Master. The "Master is always in complete charge of

his vessel", (Tingley, p. 34 l. 3); it's the Master's vessel "and they're in complete charge", (Tingley, p. 48, l. 23), and Capt. Tingley was "always ready when the Master wants to go including back to Homer any time", (Tingley, p. 57, ll. 6-8). Capt. Tingley testified.

> "I don't say 'I'm going to Drift River whether you want to go or not'. That is not it. I am giving advice and giving a service that he has required -- asked for, requested. If he says 'I don't like the looks of this -- this is too much. Let's go back', there's no argument. I say, 'fine'.
>
> * * *
>
> I always inform all Masters that any time they want to turn around, I'm ready to go. It makes no difference to me." (Tingley, p. 57, ll. 8-17).

In proceeding from Homer to the Drift River terminal, the pilot "inform[ed] the Master anytime that he chose not to proceed, it was certainly his perogative . . . ", (Tingley, p. 71, ll. 12, 13). Captain Tingley had "been on vessels where the decision was made to turn back", (Tingley, p. 71, ll. 18, 19) and where, "the Master interpreted his charter agreement that he was not obligated to go into the ice. We would leave Homer, proceed until we found ice, and he'd say, "okay, Bill, turn around and take her home". If we found ice we'd go back to Homer . . . this has happened. This happened on good ships, (Tingley, p. 72, ll. 1-8).

Hard ice floes, approximately 100-200 yards across, were encountered, (Exhibit 17), and the "few patches of open water disappeared as we proceeded further toward the platform', (Tingley, p. 60, ll. 17, 18). The ice field was heavily concentrated, (Tingley, p. 60, ll. 19-21).

Pushing through the ice constituted "forcing ice", (Tingley, p. 60, l. 25). Anytime a vessel is in ice, it is "forcing ice", (Tingley, p. 61, l. 1). There were few "leads",

and it was necessary to "force through the ice", (Tingley, p. 62, ll. 13, 14), or "otherwise you don't go through it", Williamson, p. 72, ll. 7-9). The "ice floe was so heavy that it stalled the ship as we entered the ice", (Tingley, p. 45, ll. 12-14). The ship was "completely surrounded by ice", (Williamson, p. 69, l. 11).

The BENNINGTON was "slowed to slow and half speed before hitting hard ice", (Exhibit 17), (Williamson, p. 45, l. 15), in order to "minimize your damage, if you are going to have any damage . . . ", (Williamson, p. 67, l. 18).

The Second Mate noted the vessel's bow at times rode up on the ice, although the Master describes it as the ice coming "underneath the bow of the ship", (Williamson, p. 75, ll. 2, 3).

The vessel "listed" heavily before being stopped by the ice", (Exhibit 17-B), and when the BENNINGTON "hit the ice, she would shear one way or another, and as she would shear, . . . the height and the ship would have a tendency to roll", (Williamson, p. 75, ll. 11-14).

The ice piled up against the ship, since the ice was held "against the ship and the ice coming behind it will flow up on top of it", (Williamson, p. 77, ll. 18-21). (Williamson, p. 76, l. 23 - p. 77, l. 5). The piling up resulted from "the pressure of the ice against the ship". (Williamson, p. 76, ll. 15, 16).

In proceeding, the ship "would open up leads and the ship would even stick there several times, the ship stopped and, of course, the pilot will let the wheel go forward a bit, although he knows that the ship was not moving ahead and let it push the ice away and back up a little bit and then take another forward movement, put the ship full ahead which would get the ship moving ahead and enter this crack and follow it to get

through this field of ice so that he could get in the clear again, and we encountered that on several occasions at that particular time", (Williamson, p. 68, ll. 7-18). In putting "the ship full ahead", the ship moved over the ground two or three lengths "to get headway on it again to get through to follow these leads . . .", (Williamson, p. 74, ll. 7-18).

In entering the leads, the bow followed the "crack, regardless of what you can do about it, if the ice is heavy enough because it'll push, it will affect the direction that the bow of the ship moves in", (Williamson, p. 69, ll. 21-25).

Otherwise, the vessel was steered on various courses, sometimes changing as much as 90°, (Tingley, p. 12, ll. 6, 7), and would work ahead with the engine until ice was washed away from the stern to "make a hole to back into and try to maneuver a little bit to one side or the other to get around these pans. This was the story of proceeding to Cook Inlet on that day", (Tingley, p. 14, ll. 1-6), (Tingley, p. 61, ll. 23-25).

Throughout, the vessel was "pushing a lot of weight", (Tingley, p. 66, l. 5; p. 60, l. 24), and the vessel was "laboring and vibrating", (Williamson, p. 66, l. 5) (Williamson, p. 72, l. 24), caused by "a combination of ice and water and working our way through. You can get the same effect by putting a vessel's bow against a dock or an immovable object and working full ahead", (Tingley, p. 61, ll. 12-15).

The vessel was "stalled at times", (Exhibit 17-B) when it stopped "its forward movement in the ice and it became trapped in the ice and is moving with the ice flow and the ship is not making any headway through the ice", (Williamson, p. 73, ll. 6-9). The Master noted "the ice flow was so heavy that it stalled the ship as we entered the ice", (Williamson, p. 45, ll. 12-14), (Williamson, p. 66, ll. 11-13).

The Master noted that "it was heavier than I expected and (the pilot) even made the statement to me that it was heavier than he expected too when he got into it . . .", (Williamson, p. 82, ll. 6-10).

Insofar as Capt. Tingley was concerned, "up to that time it was the worst that he had seen", (Tingley, p. 26, l. 25).

Above Harriet Point, the ice became "less packed", but "still no clear water", (Tingley, p. 15, l. 19). Harriet Point was 9.9 miles from the platform, (Tingley, p. 75, l. 17). Capt. Williamson considered "there was no point in turning around trying to go back through because we would have the same conditions, so it was my decision to go on to the platform", (Williamson, p. 47, ll. 8-12); Williamson, p. 82, ll. 13-15). It was Williamson's decision that "w might as well proceed onto the platform and load", (Williamson, p. 95, l. 3), despite the fact that in proceeding out with the vessel loaded, there is "a tendency to do more damage to your ship because you are pushing more weight if you force the ice. That's when we were very careful not to force the ice when we were loaded because we were aware of that condition", (Williamson p. 95, ll. 13-17). "The more ballast you have, the heavier the vessel is and the harder to stop", (Tingley, p. 70, ll. 11, 12).

On January 15, 1969, at 0011, the BENNINGTON arrived off the loading platform (Tingley, p. 15, l. 22). The ice "conditions was constant right up to the time the vessel docked" (Exhibit 17-B). The "ice conditions were very heavy and it was very difficult docking the vessel", (Exhibit 17-C). The observation was contained in a statement prepared by the ship's officers of "what they saw and what they knew about it "at

the Master's request", (Williamson, p. 69, ll. 15-17). The BENNINGTON was "docked under ice conditions", (Williamson, p. 78, l. 19). The plan was "to be off of the platform in position to dock, and waiting during the flood tide, watching for an opening . . . at the end of the flood tide the current starts to turn during the last hour . . . which moves this ice away and leaves you a chance to get in", (Tingley, p. 16, ll. 4-12). With the BENNINGTON, "we got lucky . . . we got in position, we saw an opening at chance, we took advantage of it, got the ship in and tied up", (Tingley, p. 16, ll. 15-18).

Movies taken by Capt. Tingley of the next vessel on an approach to the platform showed that "conditions we docked under . . . this is around the vessel. You see some of the larger pans. . . waiting for a good chance to get in. . . this is around the vessel again. Around the stern. You see no open water. We're ahead of the platform, making our approach, watching for an opening . . . you see us moving through the ice and that large pan on the starboard bow . . . and you note there's no open water", (Tingley, p. 31, ll. 11-25). The vessel was all fast at 0315, starboard side facing down, (Tingley, p. 15, l. 23; Tingley, p. 16, ll. 15-21).

Having placed the vessel at the platform in the face of these conditions, the BENNINGTON remained through three changes in tide before finally departing from the installation. During loading, the vessel had "good cooperation with the Drift River platform . . . and men were standing by . . . everyone was trying as hard as possible . . .", (Tingley, p. 54, ll. 8-12). There are "adequate fenders on the platform", (Tingley, p. 19 l. 22). "To my best ability, all precautions were being taken. The only other thing better that we could have done was to have never entered the ice", (Tingley, p. 54, ll. 19-21).

In proceeding out with the vessel loaded, there was "a tendency to do more damage to your ship because you are pushing more weight if you force the ice. That's when we were very particular not to force the ice when we were loaded because we were aware of that condition", (Williamson, p. 95, ll. 13-17). In proceeding back to Homer, the BENNINGTON "encountered quite heavy ice . . . more heavier than it was when we went up to Homer, which was quite severe. More severe than I had ever seen before . . .", (Williamson, p. 59, ll. 22-25).

Deponent submits that on the basis of the evidence, it could be strongly argued it was not "practical" for the Master to persist in sustaining increasing damage by "bulling" his way through one big ice pack on his way to the platform, at the platform, and returning from the platform.

For arbitrators to make out whether it "seemed practical" for the vessel to proceed a controlling factor after the arbitration hearings were concluded, deprives charterer of any opportunity to meet that issue. In so holding, arbitrators have exceeded their powers.

WHEREFORE, deponent respectfully prays that an order be made vacating, or otherwise modifying the arbitration award herein, and that an order be made staying the proceedings of owner to enforce the award.

Sworn to before me this

day of June, 1975

WILLIAM J. McANDREWS
Notary Public, State of New York
No. 41-2097004 Qtsego County
Certificate Filed in New York County
Term Expires March 30, 19

In the Matter of the Arbitration between

CHARLES KURZ & COMPANY, Owner

of the

S.S. BENNINGTON

and

UNION OIL COMPANY OF CALIFORNIA, Charterers

AWARD

Arbitrators:

Mr. Arthur [illegible]
Mr. George F. [illegible]
Mr. John [illegible], Chairman

Appearances:

Kirlin, Campbell & Keating, Esqs.

Attorneys for Owners
by: Richard W. Sommer and
Harold Ingham, of Counsel

[illegible] & Mount, Esqs.

Attorneys for Charterers
by: John J. Sullivan and
Frank J. Maloy, of Counsel

GENERAL BACKGROUND:

This dispute arose out of a Charter Party, dated August 27, 1958 between CHARLES KURZ & CO., Owner of the BENNINGTON, and the UNION OIL CO. OF CALIFORNIA. The Charter was on the 1950 Standard Oil Company form "STANDARDTIME", with a number of additional clauses on a rider, and it provided for twenty-four months' trading and specified in Clause No. 2: "Vessel is to be traded between ports on the U.S. West Coast, including Alaska."

THE DISPUTES:

The dispute specifically involves a sum of $651,367 for ice damage to the vessel in the course of a voyage to and from Drift River in Cook Inlet, Alaska in January of 1960 (vessel actually docked at 0315 on January 15, commenced loading shortly thereafter, and sailed at 2140 on the same day). The platform at which the vessel was docked, known as the [illegible] LINE,

Exhibit I

was in its second year of use. It was built and owned by a consortium of oil companies of which UNION OIL was a member. Neither the Captain nor the vessel had ever been to the platform before.

The two clauses in the Charter Party particularly bearing on the dispute are the following:

Clause No. 28 - The cargo or cargoes shall be laden and discharged in any dock, or at any wharf or place that the Charterer or its Agents may direct where the vessel can always be safely afloat.

Clause No. 53 - The vessel shall not be ordered to or bound to enter any icebound port or place or any place where lights, light ships, marks or buoys on vessels arrival are or are likely to be withdrawn by reason of ice or where there is risk that ordinarily the vessel will not be able on account of ice to enter, reach or leave the place. The vessel shall not be obliged to force ice. If on account of ice the Master considers it dangerous to enter or remain at any loading or discharging place for fear of the vessel being frozen in and/or damaged he shall have the liberty to sail to another place or port which is free from ice and there await Charterer's further instructions. The whole of the time occupied from time the vessel is diverted by reason of ice or other conditions until her arrival at an ice-free port as well as any detention by reason of ice or any of the above causes to count on hire but if Master has taken the decision to proceed and any ice damage shall consequently occur, vessel to go off hire during the repair period. Notwithstanding the foregoing, the vessel is not to be diverted to another port, unless Charterer so directs, provided Cook Inlet pilots are agreeable to taking vessel into Nikiski or Drift River, it being understood that Master's judgment shall control as to whether or not vessel proceeds into said Nikiski or Drift River and hire shall not be suspended because of such exercise of Master's judgment not to proceed into Nikiski or Drift River.

Essentially, the Owners base their claim on Clause No. 28, maintaining that the berth at the CHRISTIE LEE platform at Drift River was unsafe. The Charterer based his defense on Clause No. 53, maintaining that the Master should have turned back when he began to encounter ice. The defense did not present any witnesses or evidence.

Other claims which might have been asserted as a result of this incident, such as deadfreight or detention time, were settled by the parties, leaving only the question of liability for the damage to the ship to be decided.

PROCEDURE:

The Panel held three hearings, examined numerous Exhibits, including photographs taken of the vessel in drydock showing damage to the hull and to the propeller, heard testimony from the Master and from a surveyor, and examined a deposition from Capt. William A. Tingley, who was the Drift River pilot involved. This deposition was taken in Anchorage, Alaska, by attorneys representing both parties to the dispute. The Panel also viewed moving pictures taken by the pilot.

ARGUMENTS:

The Charterer took the position that it was not possible to distinguish between ice damage en route to the pier, at the pier, and coming away on the downward voyage.

From the evidence, it was indicated that by the time vessel left Homer Point Station on the afternoon of January 14th it looked as if she would be able to make it. The pilot testified that he had checked the platform at Drift River and received information that there were ice conditions, but that vessel would be able to proceed to the platform, which was 74 miles from the Pilot's Station. The pilot testified that they first began to encounter ice about 35 miles southward from the platform. They reduced speed and followed open leads, but the ice was increasing and the Master contacted the Drift River platform as they approached Harriet Point. They received a favorable report that there was some ice at the platform, but that things looked reasonably good and they went on. It became easier to maneuver when they were above Harriet Point, with the ice less packed, and they were off the platform at the anchorage area shortly before

maximum flood. They saw an opening to dock and tied up starboard side to, heading down river at about 0315 on the 15th, and loading began almost immediately.

It appears that conditions grew steadily worse while the vessel was at the dock. The down river current forced ice against the vessel with considerable force, both between the vessel and the platform and against the outer side. It was constantly necessary to use the engine to hold the vessel in position, in view of the pressure of the current and the ice, and on more than one occasion loading was interrupted in the hope that conditions would improve. Finally, at 1900 on January 15th the Master decided that it was too dangerous to stay any longer and ordered discontinuance of loading, so that the vessel left the dock at 2140 and proceeded down river with less than a full cargo. She encountered heavy patches of ice on the voyage down river, at no time moving at more than two or three knots. When clear, the vessel proceeded south to Oleum, California, where she discharged her cargo of oil and a preliminary survey was held. She then went in ballast to the plant of the Williamette Iron and Steel Company, Richmond, California, where survey was made and repairs effected.

There was no dispute concerning the amount of damage to the vessel. Charterer maintains that there is no way of telling how much of the damage was incurred while en route to the loading pier in Drift River, while at the pier, and while proceeding down river again. It should be mentioned that, when they were well into ice on the way up, the Master considered that perhaps they should turn back. He conferred with the pilot and he called the loading platform. They told him that as far as they could see by searchlight, it was fairly clear at the platform and they could not see any ice. He conferred with the pilot and, as it was practically clear at that time, they decided it was better

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to go on up to the platform rather than turn around and go back to the ice flow they had already traversed.

The pilot's testimony was taken in Alaska and his deposition was received and read by the Panel. He testified that:

(1) Before boarding the vessel he, or his office, checked conditions with Drift River platform and they were told there were ice conditions at and around the platform but it was indicated they would be able to proceed.

(2) The ice conditions on the morning floodtide were "as bad as I had seen up to this time."

(3) The ice conditions on the way out were much heavier than coming in, especially in Harriet Point area.

(4) "The ice conditions were "always different."

Q: Would it have done any good for you to have flown up to the platofrm and looked at the ice conditions before you got aboard?

A: It would have done good. I would have a full knowledge at that time, but it would require eleven to twelve hours to get the ship up there and then you have a different condition altogether."

(5) There are occasions in Drift River when everything is clear - "no ice around platform - beautiful, and the rest of the inlet is chock-a-block full (of ice). This is something you can't predict." Cook Inlet is constantly changing. "Things are bad, we're just about to the end of our rope and zoom, in three or four days it's almot like summer."

(6) He stated there were no structures at Drift River implanted in the bottom or around the platform to protect vessels from ice by responding "at this time? at the time of the Bennington episode, nothing."

He described the ice conditions on the entire trip as "the worst I had seen up to that time. Bearing in mind that this was only the second winter of operation and the first winter was comparitively mild we were all finding things out during this time."

AWARD:

The majority of the Panel feel that there was a violation of the Safe Berth Clause in the Charter Party. It was obvious that a steamer would encounter ice proceeding up Cook Inlet to Drift River in the winter and the Charterers must have known it. The majority of the Panel does not agree with the Charterers' position that Clause No. 53 meant the Master should have turned back. Everyone knew she would encounter some ice if she was sent to Drift River in January. While not relieving the Master's judgment of its control of the matter, the majority of the Panel feel that the wording in Clause No. 53 implies that vessel is to go through ice if it seems practical, and that whether or not the Cook Inlet's pilots are agreeable to taking the vessel to Drift River is important. The pilot has testified that he was agreeable. The majority of the Panel also feel that, after consideration of the testimony, pictures, etc. most of the damage occured while the vessel was being battered at the dock and during the outward voyage. The more heavily laden, the greater the damage to be caused. However, the Panel proposes to reduce Owner's claim by 10% to allow for some damage en route up river to the dock.

The Charterer makes much of a point of the failure of the Owner to give the Master a copy of the Charter Party, so that the Master did not know what the contractual provisions were that covered the voyage. The Master, not having a copy of the Charter, simply assumed that as Master he had control of the ship and could refuse to go up to the platform or could turn around and go back at any time in his judgment that he thought it was proper. While the failure to furnish him with the pertinent provisions of the Charter is indeed surprising,

the majority of the Panel that his actions would not have been different if he had received a copy of the Charter provisions and that, in fact, he might well have been even more impelled to go on up because the pilot was agreeable to do so.

The Panel received no evidence as to any changes that may have been made in the terminal since this incident in January, 1969, and the majority of the Panel therefore only finds that this berth was, at that time, unsafe.

The majority feel that the Charterer is not relieved of legal responsibility for the consequences of his Breach of Contract (sending vessel to an unsafe berth) "unless the course followed by the Captain is so imprudent that it can fairly be said to be an intervening act of negligence." The pilot testified that "the master did everything one could expect" and the majority fully agree with this assessment.

Under the circumstances, the majority of the Panel award the Owner his claim of $661,551 less 10%, giving a net of $595,395.90. In addition, the Panel awards the Owner interest on this sum at 5% per annum (this taking into consideration varying interest rates since time of the incident until now) from March 21, 1969 to February 15, 1975.

DISSENT:

Captain Stam dissents from the majority decision, believing that the Ice Clause No. 53 shields the Charterers completely from liability, that had the Master a copy of the Charter Party, upon encountering ice he would and should have refused to proceed further while seeking instructions from the Charterer.

SUMMARY:

Each side will pay their own legal expenses and cost of the stenographic record will be equally divided between them.

Arbitrators set their fees at $4,000 for each arbitrator, each of the two parties to the dispute to pay the sum of $2,000 to each of the three arbitrators.

Arthur Ferris

George T. Stam
"IN DISSENT"

John M. Reynolds
Chairman

New York, N. Y.
May 20, 1975

Exhibit II

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MARITIME ARBITRATION RULES SOCIETY OF MARITIME ARBITRATORS, INC.

I. RULES A PART OF THE ARBITRATION AGREEMENT

Section 1. Agreement of Parties - The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever, in the Submission or otherwise they have provided for arbitration by the Society of Maritime Arbitrators or under its Rules. These Rules and any amendment thereof shall apply in the form obtaining at the time the agreement to arbitrate is effected.

Unless stated to the contrary in advance, the parties agree by consenting to these rules that the Award issued in consequence of their case may be published by the Society of Maritime Arbitrators and/or correspondents.

II. TRIBUNALS

Section 2. Name of Tribunal - Any Tribunal constituted by the parties for the settlement of their dispute under these Rules shall be called the Maritime Arbitration Tribunal, hereinafter referred to as the "Panel".

Section 3. Panels of Arbitrators - The Society shall establish and maintain lists of persons with qualifications as Arbitrators and parties may appoint Arbitrators therefrom in the manner prescribed in these Rules.

Section 4. Office of Tribunal - Depending upon the number of arbitrators acting, the office of the Tribunal shall be as follows:

(a) Sole Arbitrator - His business or home address, as he elects

(b) Two Arbitrators - The home or business address of either of the Arbitrators, as decided between them. In the event of appointment by them of a third Arbitrator or chairman the office of the Tribunal shall shift to the business or home address of such third Arbitrator.

(c) Three Arbitrators - The business or home address of the Third Arbitrator designated by the original two members of the Tribunal appointed by the parties.

III. INITIATION OF THE ARBITRATION

Section 5. Initiation Under an Arbitration Provision in a Contract - Any party to a contract containing a clause providing for arbitration under the Society Rules, or any party to a contract containing a general arbitration clause when the parties have agreed, by stipulation or otherwise, to arbitrate under the Rules of the Society, may commence an arbitration by such party serving written notice upon the other party of intention to resort to arbitration.

Section 6. Initiation Under a Submission - Any party to an existing dispute may commence an arbitration under these Rules by filing with the other party a written request to arbitrate under these Rules (Submission), containing a statement of the matter in dispute, the amount of money involved, if any, and the remedy sought.

After presentation to the Panel, a Submission jointly agreed by the parties may not be changed unilaterally, but only by mutual consent of the parties. The Panel may, in its discretion, permit either party to make necessary corrections or changes to the Submission which are related and consistent with the basic spirit and context of the Submission.

Section 7. Fixing of Locality - The locality where the arbitration is to be held shall be New York City if not specified otherwise in the agreement to arbitrate; or unless the parties determine that it is more practical that the arbitration be held elsewhere.

IV. APPOINTMENT OF ARBITRATOR(S)

Section 8. Disqualification - No person shallserveas an Arbitrator if he has any financial or personal interest in the result of the arbitration nor if he has acquired detailed prior knowledge of the dispute.

Section 9. Disclosure By Arbitrator(s) of Disqualifying Circumstances - Preferably at the time of receiving his notice of appointment, but not later than the commencement of the first hearing, a prospective Arbitrator is required to disclose any circumstance tending to raise a presumption of bias or which he believes might disqualify him as an impartial Arbitrator including close personal ties or business relations with any one of, (a) either of the parties (b) other affiliates of the parties, (c) with counsel for either party, or, (d) with the other Arbitrators on the panel.

Upon receipt of such information, the parties, shall declare if willing to proceed under the circumstances disclosed. If either party declines to waive a presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules.

Section 10. Direct Appointment by Parties - If the Submission or other agreement of the parties specifies any direct method by which the Arbitrator(s) is to be appointed, that designation or method shall be followed. Upon the request of any party, the Society shall submit a list of members from which the party, shall, if possible, make an appointment.

If a submission or other agreement specifies a period of time within which the Arbitrator(s) shall be appointed, and any party fails to make such appointment within that period, resort may be had to Section 5 of the Act.

Section 11. Appointment Under Act - If the parties have not appointed an Arbitrator(s) and have not provided any other method of appointment, the Arbitrator(s) shall be appointed in the manner prescribed in Section 5 of the Act.

Section 12. Appointment of Additional Arbitrator by Named Arbitrators - If the parties have named their Arbitrators and have authorized such Arbitrators to appoint an additional Arbitrator within a specified time, and no appointment is made within such time or any agreed extension thereof, resort may be had to Section 5 of the Act.

If no period of time is specified by the parties within which named Arbitrators are to appoint an additional Arbitrator, a period of 30 days from the date of the appointment of the named Arbitrator last appointed shall be allowed for their appointment of the additional Arbitrator. The Society may furnish the named Arbitrators with a Panel list and the appointment of the additional Arbitrator shall, if possible, be made from such list. In the event of their failure to make the appointment within such 30 days, resort may be had to Section 5 of the Act.

Section 13. Notice of Appointment to Arbitrator(s) - Notice of the appointment of the Arbitrator(s), whether appointed by the parties or by the Court, shall be sent by the nominating party to the Arbitrator(s), and the acceptance of the Arbitrator(s) shall be communicated to the parties prior to the opening of the first hearing.

Section 14. Vacancies - If any Arbitrator(s) should die, withdraw, refuse or be unable to or disqualified from performing the duties of his office, vacancies shall be filled as follows:

(a) If the vacancy is created by an Arbitrator appointed by either party, the one who nominated him will name a replacement, but that replacement shall not have the right to change the chairman previously appointed by the original two Arbitrators.

(b) If the vacancy is created by the chairman the two Arbitrators shall appoint a new chairman.

(c) Any other circumstances requiring the filling of vacancies shall be covered by resorting to Section 5 of the Act.

If already heard, the matter shall be reheard, unless the parties agree otherwise.

V. PROCEDURE FOR ORAL HEARING

Section 15. Time and Place - The Arbitrator(s) shall fix the time and place for each hearing and shall mail prior thereto reasonable notice of the first hearing to each party.

Section 16. Representation by Counsel - Any party may be represented by counsel. A party so represented or its counsel shall notify in writing the other party and file a copy of the notice, which shall contain the name and address of counsel, reasonably in advance of the date set for the hearing at which counsel is first to appear.

Section 17. Taking of a Stenographic Record - The party or parties shall make the necessary arrangements for the taking of a stenographic record of the testimony whenever such record is desired by one or more parties. The requesting party or parties shall initially pay the cost of such record subject to apportionment by the Arbitrators.

Section 18. Interpreters - The party or parties shall make the necessary arrangements for the services of an interpreter, if needed. The requesting party or parties shall pay the cost of such service.

Section 19. Attendance at Hearings - Persons having a direct interest in the arbitration are entitled to attend hearings. It shall be within the discretion of the Arbitrator(s) whether or not to permit the attendance of any other persons. The Arbitrator(s) shall have the power to require the retirement of any witness or witnesses during the testimony of other witnesses.

Section 20. Adjournments - The Arbitrator(s), upon a showing of good cause, may take adjournments at the request of a party. A request by all parties for an adjournment shall be granted unless, in the judgment of the Arbitrator(s), such request will unduly inconvenience the Arbitrator(s) or unduly protract the arbitration.

Section 21. Oaths - Before proceeding with the first hearing, or with the examination of the file as provided under Rule VI, each Arbitrator shall take an oath of office.

The Arbitrator(s) shall require witnesses to testify under oath administered by any duly qualified person. (See Appendix C)

Section 22. Majority Decision - Whenever there is more than one Arbitrator, the decision and award of the

Arbitrators shall be by majority vote unless the concurrence of all is expressly required by the arbitration agreement.

Section 23. Order of Proceedings - A hearing shall be opened by the recording of a Minute by the Arbitrator(s). The Minute shall set forth the place, time and date of the hearing, the presence of the Arbitrator(s) and parties and counsel, if any, and the receipt by the Arbitrator(s) of a written or oral Submission agreement.

The Arbitrator(s) may, at the beginning of the hearing, ask for statements clarifying the issues involved.

The complaining party, or his counsel, shall then present the party's claim and proofs and his witnesses who shall submit to questions or other examination. The defending party, or his counsel, shall then present the party's defense and proofs and his witnesses who shall submit to questions or other examination. If it is not clear which party is the complainant, the Arbitrator(s) shall make the determination. The Arbitrator(s) may vary this procedure in his discretion but shall afford full and equal opportunity to all parties for the presentation of any material and relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the Arbitrator(s) and when so received shall be numbered by the Arbitrator(s) and made part of the record. The Arbitrator(s) shall make as part of the record a list of the names and addresses of all witnesses.

Section 24. Arbitration in the Absence of a Party - After a default has been established under the provisions of Section 4 of the Act, the arbitration may proceed in the absence of the defaulting party, who, after due notice, failed to be present or failed to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator(s) shall require the other party to submit such evidence as he may require for the making of an award.

Section 25. Evidence - The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator(s) may deem necessary to an understanding and determination of the dispute. The Arbitrator(s) may summon witnesses or documents upon his own initiative or at the request of any party by subpoena, if necessary. (See Appendix A)

The Arbitrator(s) shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of the Arbitrator(s) and of all the parties except where any of the parties is without reasonable cause absent, in default, or has waived his right to be present or where submission of evidence by mail or in other form has been agreed by both parties.

Section 26. Evidence By Affidavit and Filing of Documents - The Arbitrator(s) may receive and consider the evidence of witnesses by affidavit, but shall defer ascribing weight to such evidence until after consideration of any objections made to its admission.

All documents not filed with the Arbitrator(s) at the hearing, but which are arranged at the hearing or subsequently by agreement of the parties to be filed later, shall be open to inspection by all parties after such filing.

Section 27. Inspection or Investigation - Whenever the Arbitrator(s) deems it necessary to make an inspection or investigation in connection with the arbitration, he shall advise the parties of his intention to make an inspection or investigation. The Arbitrator(s) shall set the time and shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that the parties, or any of them, are not present at the inspection or investigation, the Arbitrator(s) shall make a verbal or written report to the parties and afford an opportunity for the receipt of comment or testimony in relation thereto.

Section 28. Conservation of Property - The Arbitrator(s) with the consent of the parties, may issue such orders as may be deemed necessary to safeguard the subject matter of the arbitration, without prejudice to the rights of the parties or to the final determination of the dispute.

Section 29. Closing of Hearings - The Arbitrator(s) shall specifically inquire of all parties whether they have further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator(s) shall declare the hearings closed and a Minute thereof shall be recorded. If briefs are to be filed the hearings shall be declared closed as of the final date set by the Arbitrator(s) for the receipt of briefs. If documents are to be filed as provided in Section 26, and the date set for their receipt is later than that set for the receipt of briefs, then such later date shall be the date of closing the hearing. The time limits, referred to in Section 32 of these Rules, within which the Arbitrator(s) is required to make his award, shall commence to run, in the absence of other agreement by the parties, upon the closing of the hearings.

Section 30. Reopening of Hearings - The hearings may be reopened by the Arbitrator(s) on his own motion or upon application of a party for good cause shown at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the Arbitrator(s) may reopen the hearings and the

Arbitrator(s) shall have 90 days from the closing of the reopened hearings within which to make an award.

VI. PROCEDURE FOR OTHER THAN ORAL HEARINGS

Section 31. Waiver of Oral Hearings - The parties, by written agreement, may submit their dispute to arbitration by other than oral hearing. Such arbitration shall be conducted under these Maritime Arbitration Rules, except such provisions thereof as are inconsistent with this Rule VI.

If no method is specified by the parties, proofs shall be presented in the following manner: The parties shall, on a date set by the Panel submit to the Panel their respective contentions in writing, including a Submission agreement together with such other proofs as they may wish to submit. These documents may be accompanied by written arguments or briefs. Copies of all such statements, proofs and briefs shall simultaneously be served upon the other party.

Each party may reply to the other's statement, proofs and brief, but upon the failure of any party to make such a reply within a period of fifteen days after service of such documents upon him, he shall be deemed to have waived the right to reply.

The Arbitrator(s) shall have fifteen days from the date of receipt of reply documents (or, if none, twenty days after receipt of the principal documents) within which to request a party or parties to produce additional proof. Upon receiving such request, the party or parties shall submit such additional proof to the Panel with copies to the other party, within fifteen days from the date of service of such notice. Each party may make reply to such statement and proofs, but, upon the failure of any party to make such a reply within a period of ten days after receipt by him of such documents, he shall be deemed to have waived the right to reply.

Upon mailing or delivery to the Arbitrator(s) of all documents submitted as provided above, the arbitration shall be deemed closed and the time limit within which the Arbitrator(s) shall make his award shall begin to run.

Upon rendering his award, the Arbitrator(s) shall return all proofs and documents to the respective parties as may be requested by them.

VII. THE AWARD

Section 32. Time - The Arbitrator(s) shall render his or their Award as expeditiously as possible but in no case later than 90 days from the receipt by Arbitrators of the last evidence, transcript or brief, whichever shall be the last received.

Section 33. Form - The award shall be in writing and shall be signed either by the sole Arbitrator or by a majority if there be more than one or by all if unanimous. A partial or total dissent shall be signed by the dissenter and included with the majority award.

Section 34. Scope - The Arbitrator(s), in his award, may grant any remedy or relief which he deems just and equitable and within the scope of the Submission agreement of the parties. The Arbitrator(s), in his award, shall assess the arbitration fees and expenses as provided in Section 41, in favor of any party and, any administrative fees or expenses due the Chairman.

Section 35. Award Upon Settlement - If the parties settle their dispute during the course of the arbitration, the Arbitrator(s), upon such parties' request, may set forth the terms of the agreed settlement in an award.

Section 36. Delivery of Award to Parties - Parties shall accept as legal delivery of the award (a) the placing of the award or a true copy thereof in the mail by the Arbitrator(s), addressed to such party at his last known address or to his attorney, or, (b) personal service of the award.

Section 37. Release of Certified Documents - The Arbitrator(s) shall, upon the written request of a party, furnish to such party at the party's expense certified facsimiles of any papers in the Panel's possession.

VIII. SPECIAL PROVISIONS

Section 38. Waiver of Rules - Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with, and who fails to state his objection thereto in writing, shall be deemed to have waived his right to object.

Section 39. Time Periods - The parties may modify any period of time by mutual agreement and consent of the Arbitrator(s). The Arbitrator(s) may extend or shorten any period of time established by the Rules upon a showing of good cause and shall notify the parties of any such extension or shortening of time and reason therefor.

Section 40. Service of Documents - Each party to a Submission or other agreement which provides for arbitration under these Rules shall be deemed to have consented and shall consent that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party (a) by mail addressed to such party or his attorney at his last known address or (b) by personal

service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America). All documents shall bear the date of service and sworn proof thereof shall not be required unless specifically requested by a party or the Arbitrator(s). The Counsel of either party may be utilizied by the Panel to implement subpoenas or other legal procedures instituted by the Panel. The expenses and fees for such services are to be allocated as the Arbitrator(s) decide.

IX. FEES AND EXPENSES

Section 41. Expenses - The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be pro-rated equally among all parties ordering copies, unless they shall otherwise agree, or the Panel otherwise awards, and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the Arbitrator(s) and the expenses of any witnesses or the cost of any proofs produced at the direct request of the Arbitrator(s), shall be borne equally by the parties, unless they agree otherwise, or unless the Arbitrator(s) in his award assesses such expenses or any part thereof against a specified party or parties.

The travel and living expenses of an Arbitrator(s) from outside the area named for the arbitration shall be borne in the first instance by the party who appointed him, unless the Panel awards otherwise.

The Arbitrator(s) may award to the Chairman any expenses advanced or incurred on behalf of the arbitration proceeding and any fees due and remaining unpaid by any party responsible therefor.

Section 42. Arbitrator(s) Fee - The Arbitrator(s) shall determine the amount of his compensation. In determining such amount, regard shall be had to (1) the time taken to hear, consider and determine the issues presented, (2) the magnitude of the claim or subject matter, (3) the complexity of the facts and issues, and (4) the importance or urgency of the matter being arbitrated. If the dispute is settled during the course of the arbitration, the Arbitrator(s) is nevertheless entitled to a fee commensurate with his involvement in the arbitration. The Arbitrator(s) may demand their fees and expenses be paid before releasing the award.

Section 43. Deposits - The Arbitrator(s) may require the parties to deposit in advance such sums of money as either deems necessary to defray the expense of the arbitration, including the Arbitrator(s) fee, if any, and shall render an accounting to the parties and return any unexpended balance.

INTERPRETATION AND APPLICATION OF RULES

Section 44. Interpretation and Application of Rules - The Arbitrator(s) shall interpret and apply these Rules insofar as they relate to his powers and duties. When there is more than one Arbitrator, and a difference arises among them concerning the meaning or application of any such Rules, the difference shall be settled by majority vote.

* * * * *

Additional copies of these Rules may be purchased from the Society for $1.00 per copy.

Exhibit III 60A

John Murray Reynolds
17 Battery Place
New York City

April 22, 1975

Mr. Richard H. Sommer
Kirlin, Campbell & Keating
120 Broadway
New York, N. Y. 10005

Mr. John J. Sullivan
Mendes & Mount
27 William Street
New York, N. Y. 10005

BENNINGTON
Arbitration
230863

Gentlemen:

The Panel has set noon time on April 29th for a conference in an effort to settle the above case. Unfortunately, George Stam is now in the hospital with a kidney ailment. There is a very slight chance of his being out on the date of the conference in the process of transferring from the Westchester Hospital to a New York hospital. However, if he is unable to make that date, there may well be a very extended delay, so that we request both counsel to waive the time provision in the Rules of the Society.

If such an extended delay does eventuate, will you gentlemen wish Mr. Ferris and myself to get together to discuss the case without Mr. Stam at that time in case it should happen that Mr. Ferris and I are in accord anyway?

Please advise me or Mrs. Feldman in this office promptly on that point.

Very truly yours

John M. Reynolds

JMR:RF
CC: Mr. Arthur Ferris
Mr. George T. Stam

Exhibit III

Exhibit IV

61A

April 23, 1975

Mr. John Murray Reynolds
17 Battery Place
New York, N. Y. 10004

Mr. Arthur E. Ferris
47 Winchester Drive
Manhasset, New York 11030

Capt. George T. Stam
c/o Bunge Corp.
One Chase Manhattan Plaza
New York, N. Y. 10005

Re: S/S BENNINGTON
Our File: 230,803

Dear Sirs:

Reference is made to Mr. Reynolds letter of April 22nd concerning the arbitration in the captioned matter. We are sorry to hear of Captain Stam's illness, and are prepared to waive the time provision in The Rules of the Society.

We believe it preferable that the panel have the benefit of all arbitrators' views and comments in arriving at a conclusion on the issues presented and, as such, request that the panel's deliberations be deferred until Captain Stam is able to attend.

Thank you for your courtesy.

Very truly yours,

MENDES & MOUNT

By: John J. Sullivan

JJS:dc
cc: Kirlin, Campbell & Keating
120 Broadway
New York, N. Y. 10005
Att: Richard H. Sommer, Esq.

Exhibit IV

Exhibit V 62A

John Murray Reynolds
17 Battery Place
New York City

June 3, 1975

Mr. Richard M. Sommer
Kirlin, Campbell & Keating
120 Broadway
New York, N. Y. 10005

Mr. John J. Sullivan
Mendes & Mount
27 William Street
New York, N. Y. 10005

BENNINGTON
Arbitration

Gentlemen:

Copies of the Award in the above vessel are enclosed herewith.

Please advise if you wish any or all of your Exhibits returned.

Very truly yours,

John M. Reynolds

JMR:RF
Encs.

Exhibit V

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHAS. KURZ & CO., Owners of the S.S. BENNINGTON	:	
Petitioner,	:	REPLY AFFIDAVIT
and	:	75 Civil 2764 (KTD)
UNION OIL COMPANY OF CALIFORNIA	:	
Respondent.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD H. SOMMER, being duly sworn, deposes and says:

I am a member of the firm of Kirlin, Campbell & Keating, attorneys for petitioner and a member of this Honorable Court, and I am familiar with all of the proceedings heretofore had herein.

This affidavit is submitted in opposition to the cross-motion of respondent and in support of the petition to confirm the Arbitrator's Award. As is fully supported in the memorandum accompanying this affidavit, the cross-motion is clearly sham and frivolous. Section 10 of Title 9 clearly provides the only instances when a Court may make an order vacating the Award. In addition the Court of Appeals for this Circuit has limited the grounds for vacating an Award. None of the grounds of the statute nor of prior precedent are even suggested by opposing counsel.

Petitioner and respondent entered into a charter party by which respondent warranted a safe berth. On the merits, the law is clear that in this day and age a charterer's warranty of a safe berth is absolute. The arbitration panel found that there was damage to the vessel, BENNINGTON as a result of respondent's breach and made the Award in petitioners' favor.

The first ground, in respondent's attorneys' affidavit for vacating the award, is that the panel rendered the award after the time required under the S.M.A. rules adopted by the panel. Those rules required that an award be rendered no later than 90 days after the receipt of evidence. However, assuming the rules were applicable and even if an award had been rendered more than 90 days after receipt of evidence, this would not constitute grounds for vacating the award under Title 9 and prior decisions of this Court.

In fact the last "evidence, transcript or brief...." was a letter dated March 7 attached as Exhibit "B" from respondent's counsel to the panel arguing against evidence presented to the panel with a letter from petitioner's counsel dated February 27, 1975. Obviously an award dated May 20 and in the hands of counsel on June 3 is well within the 90 day period.

Finally both parties in writing agreed to waive the time limit due to the illness of one of the arbitrators. In the exhibit annexed to his affidavit, respondent's counsel attached a letter stating that respondent was prepared to waive the time limitation under the rules. Obviously that was not necessary as the arbitrators all met and came to a conclusion.

The second, third, fourth, sixth and seventh grounds for vacating the award, as set fourth in respondent's counsels' affidavit, all go to the merits of the arbitration. What opposing counsel is doing is re-arguing the facts and testimony that were presented at the several hearings before the panel. This involves

reference to testimony and the live witnesses and the re-arguing of the applicable law. The arbitrators in fact found that the vessel was damaged by ice while engaged under the charter and because the award went against respondent, respondent seeks to re-hash the evidence and the law which is clearly something that the applicable act, Title 9. U.S.C. Section 10 was designed to avoid. It is respectively submitted that the reopening of these issues by respondent is clearly improper under the law.

Finally respondent's counsel argues that the award should be vacated on the grounds that one of the arbitrators had served on a panel involving other parties and other issues but by coincidence involved a vessel at Cook Inlet. Nothing in the award of the other case referred to by respondent's counsel indicates that the same terminal was involved although the award mentions ports in Alaska and Cook Inlet. Aside from that fact, it is of course, not any ground to vacate that an arbitrator or indeed a judge has decided other cases. The other decision, while it involved ice damage at Cook Inlet, involved questions of insurance and whether or not a charterer was liable only to the extent that an owner was reimbursed by its underwriter. It is shocking that respondent's counsel suggests that an arbitrator would bring preconceived ideas to an arbitration, particulary in view of the statement to the contrary of the impartial arbitrator on the record.

By innuendo respondent's counsel would have the Court believe that one of the arbitrators (not the others) could not have come to the conclusion that he came to without prior knowledge. Respondent's counsel ignores exhibits that were introduced, including the attached Exhibit A which deals with the factual conditions at the terminal. More importantly, respondent's counsel neglects to mention that the panel viewed a color motion picture film taken by the pilot on the voyage in question showing the loading facility and the vessel and the terrible ice conditions.

Clearly the award is supported in fact and in law but even it were not the Courts have held that the award of arbitrators must be confirmed.

It is respectively submitted that the cross-motion of respondents should be denied and petition to confirm the award should be granted.

Richard H. Sommer

Sworn to before me this 7th day of July, 1975.

Notary Public

DOUGLAS C. J. BRIGANDI
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-4502787
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1977

Exhibit "A" 67A

REPORT ON THE 20th ANNUAL PIPE LINE CONFERENCE

THE STATLER HILTON, DALLAS, TEXAS, MARCH 31-APRIL 2, 1969

AMERICAN PETROLEUM INSTITUTE

Division of Transportation

ALASKA'S DRIFT RIVER MARINE TERMINAL EMPLOYS MOVABLE FENDERING SYSTEM

by

K. E. ANDERSON*

K. E. ANDERSON

Kenneth E. Anderson joined the Mobil organization in 1950 as an engineer in the Central Pipelines Division, Wichita, Kansas. After serving in various engineering and operating capacities, he was transferred to the Mobil Pipe Line Company Engineering Department at Dallas, Texas in 1962. From 1962 to 1965, he held the positions of senior engineer and manager of general engineering and actively participated in several part interest pipeline ventures including the Sirtica and Amal systems in Libya. He was appointed project manager and vice president of the Cook Inlet Pipe Line Company in mid 1966 with headquarters in Anchorage, Alaska. Upon completion of the initial Cook Inlet facilities at the end of 1967 he transferred to Mobil's North American Division offices in New York City. He assumed his present position of pipeline planning associate in June of 1968.

* Pipeline Planning Associate, Mobil Oil Corporation

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* Pipeline Planning Associate, Mobil Oil Corporation

Mr. Anderson attended Kansas State University where he earned a B. S. degree in Mechanical Engineering in 1950.

ABSTRACT

Ice floes propelled by abnormally strong tidal currents present a crushing menace to any protruding structure in the northern portion of Cook Inlet. This condition, coupled with 25 foot tides and the usual vessel freeboard variances accompanied with tanker loading operations, created a real design challenge for Cook Inlet Pipe Line Company's tanker loading dock at Drift River Alaska.

Upon analyzing the structural requirements necessary to provide a fendering system capable of withstanding the design ice forces it was determined that a conventional fixed fendering system would require massive supporting structures. In addition, likely problems associated with maintaining a fixed fendering system during the ice season appeared insurmountable, since conventional floating work equipment could not be used in the ice nor could any major diving work be carried on during that period. The high investment required for additional structural strength plus the uncertainties of maintenance quickly rendered the conclusion that a fixed fendering system was impractical for this location.

A movable fendering system was conceived to fulfill the special design requirements established by the local environmental conditions and selected deisgn criteria. The system consists of two large fendering units normally positioned slightly above the water line that are raised and lowered with the tide and ship's freeboard as the vessel is firmly moored along side of the tanker loading dock.

The Drift River Marine Terminal is now in its second year of operation in Cook Inlet's treacherous waters. The steel silhouette of the offshore tanker loading dock presents a rather spectacular contrast against the majectic background of the Aleutian Mountain Range with its active valcanoes and glaciers, but then this is Alaska where nature has provided the Producer, the Pipeliner and the Mariner with some real unusual logistic and environmental challenges.

This is the second crude oil tanker loading facility to be constructed in Cook Inlet, one of the oil industries' more active exploration and development areas in North America during the past five years. The relatively new tanker loading dock is located approximately two miles offshore from the mouth of Drift River on the west side of Cook Inlet, which is roughly 90 miles southwest

of Anchorage and about 30 miles west-southwest of Kenai. Drift River is the terminus point of a crude oil pipeline system that transports crude oil received from off-shore platforms along the west shore of the inlet. A large crude oil storage tank farm, ballast system, living quarters and other related terminal facilities are located on shore along the south side of Drift River. These common carrier facilities are owned by Cook Inlet Pipe Line Company, a corporation formed by Atlantic Richfield Oil Company, Cities Service Company, Marathon Oil Company, Mobil Oil Corporation, and Union Oil Company of California. Figure 1 shows a vicinity map of the Drift River area.

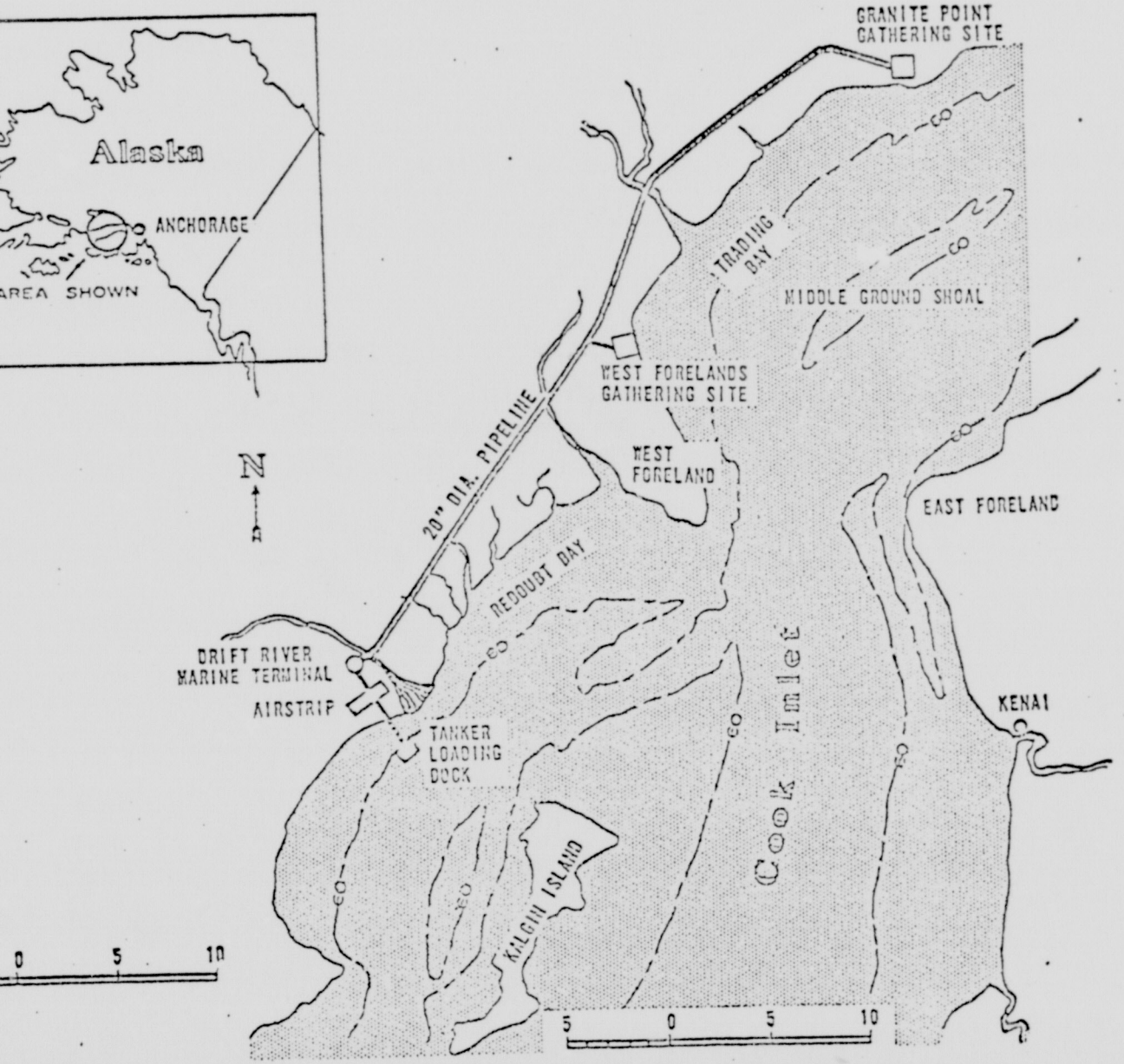
Cook Inlet extends from the Gulf of Alaska in a northeasterly direction to Anchorage, a distance of approximately 150 miles. The inlet width varies from nearly 50 miles to approximately 10 miles at the Forelands. This body of water has long been known for its high tides, strong currents and winter ice conditions. At Anchorage, high tides range up to 32 feet above datum and occasionally when a high tide is followed by a negative low tide the total tide range can be 36 feet or greater. The extreme range of the semi-diurnal tides prevents the inlet from freezing solid by breaking the ice into large floes which move back and forth with the tides. Generally the area north of the Forelands becomes clogged with ice floes whereas the enlargement of the inlet to the south of the Forelands tends to disperse the floes and thereby reduce the ice concentration. Normally, the ice season prevails from January through March.

Because of the extreme tide and ice conditions, considerable design criteria had to be developed and special construction requirements established for the offshore tanker loading dock. // The dock contains five separate structures consisting of a central positioned platform, two breasting dolphins equally spaced on each side of the platform and two mooring dolphins equally spaced outboard from each of the two breasting dolphins. Figure 2 is a photograph of a model of the dock facilities. The design and construction techniques employed in the main dock structures and their many components are indeed interesting subjects within themselves. However, the scope of this paper will be limited to the movable fendering system which faces the two breasting dolphins and prevents vessels from nesting against the central platform structure.

Fendering is a necessary component of all mooring docks, its configuration and use being dependent upon the prevailing conditions, such as ship size, sea exposure, impact energy requirements, and any other particular environmental and operating conditions natural to the location. Due to the many different requirements, a great variety of fendering systems are employed today around the world's

Fig. 1

VICINITY MAP OF DRIFT RIVER AREA

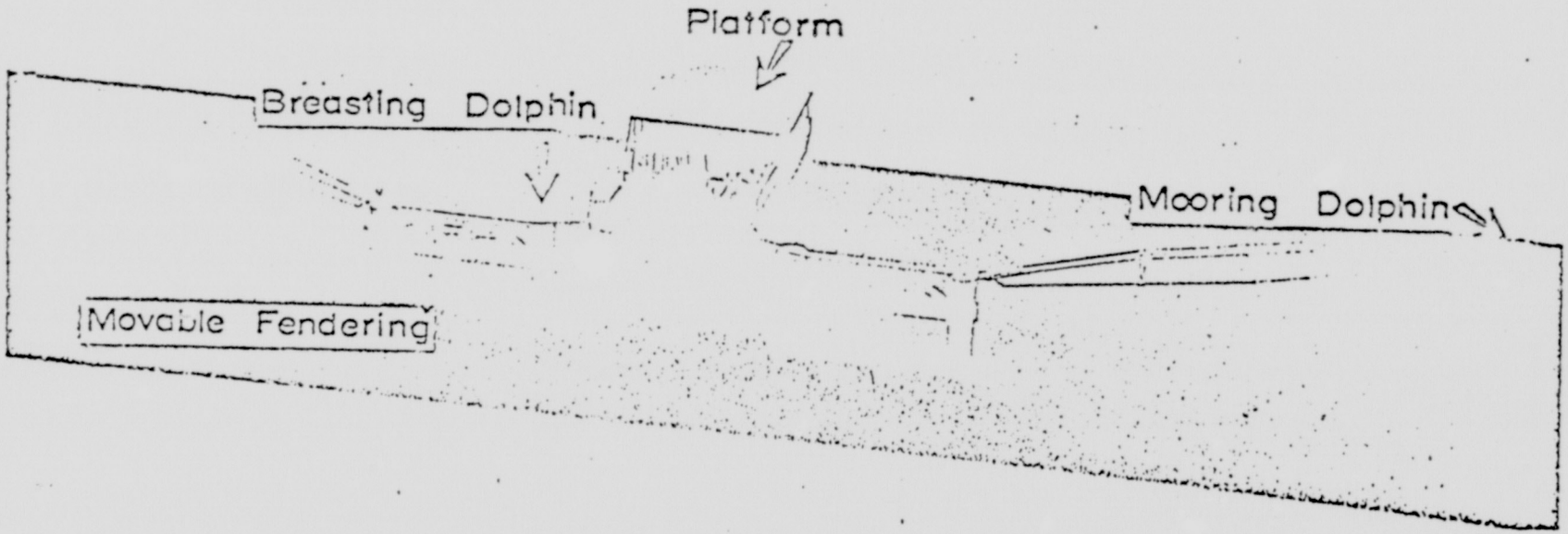


100.

72A

Fig. 2

Photograph of Tanker Loading Dock Model



seaports. Probably the most common installations consist of resilient or spring fender units, batter piling of several types - such as wood, steel and reinforced concrete, or a combination of these various components. In most instances, some form of expendable type facing such as timber or flexible spring units are usually mounted directly to a permanent structure in a manner to provide easy maintenance and replacement. The majority of fendering systems used today are of the fixed or stationery type, i.e. their position is not adjusted during the mooring period. Fendering is necessary not only to protect the vessel but also to protect the dock structure.

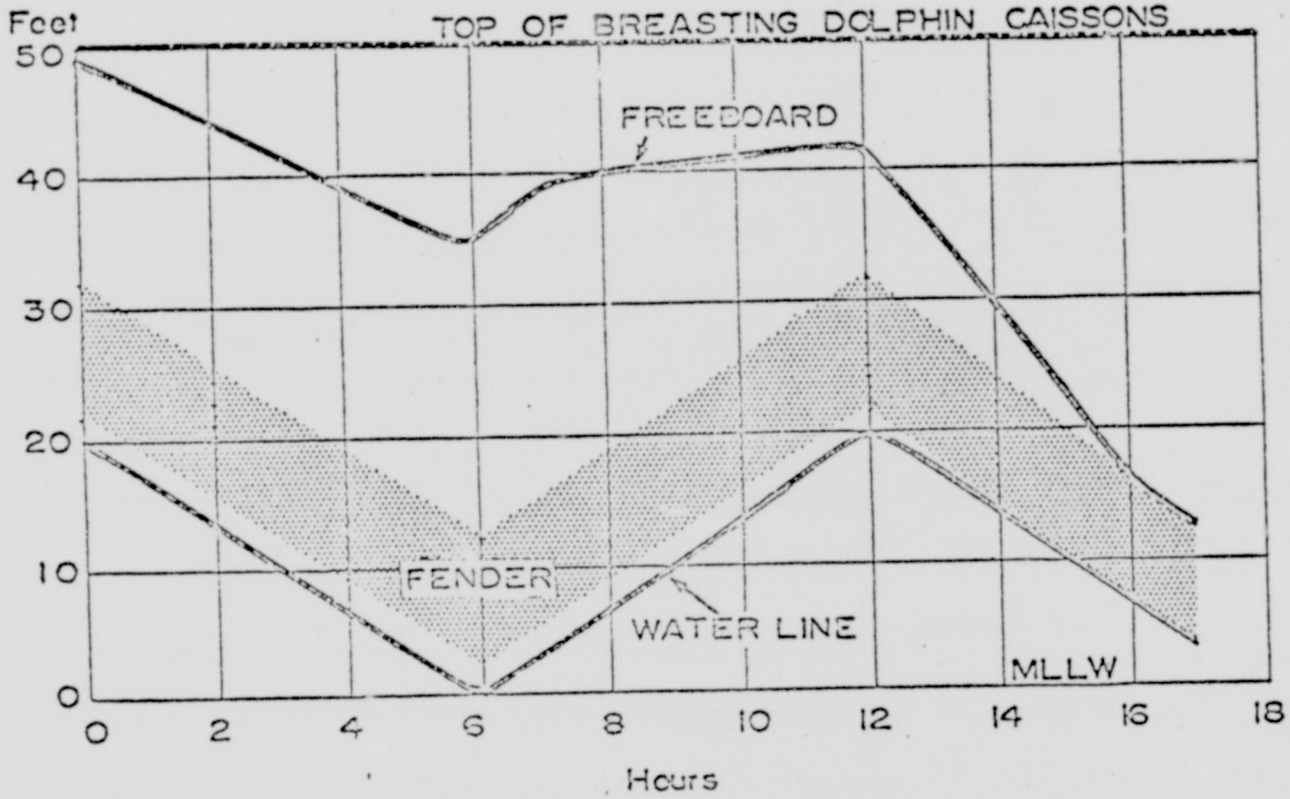
One of the basic requirements of fendering is that it must be sufficiently soft so as to prevent damage to the ship and at the same time it must be of suitable strength to maintain its shape without requiring excessive maintenance or replacement. This prerequisite, plus the criteria that ships would dock at Drift River without tug assistance, meant considerable impact energy had to be accommodated by both the fendering system and by the breasting dolphin to which the fendering was to be attached. Docking forces established for the Drift River terminal design were based on a 30,000 DWT tanker loaded with one third ballast, docking at a velocity of one foot per second normal to the fender face. It was further stipulated that the initial design would incorporate necessary provisions to accommodate an ultimate vessel size of 100,000 DWT. Docking criterial for the 100,000 DWT tanker was based on one third ballast load and a docking velocity of .6 feet per second normal to the fender line.

Normal tide range at the terminal site is 20-23 feet except for the two higher seasonal tides which occur once in the spring and autumn that occasionally reach 25 feet. A maximum tide range of 27-29 feet has been experienced due to combination of high and negative tides. Tides then at Drift River are somewhat less than those just 90 miles away at Anchorage; nevertheless, they are still significant especially with their predominant semi-diurnal cycle, (two high tides and two low tides per 24-hour day). There are occasions where the tidal cycle becomes mixed as it approaches a diurnal pattern although the frequency of these occurrences is minor.

These unusually high tides coupled with varying ship freeboard present a considerable range of fendering area requirements. Figure 3 graphically indicates the range of fendering surface required for a 30,000 DWT tanker starting the loading cycle on a slack 20 foot high tide and assuming a 17 hour dock turnaround period. For the purpose of this illustration, it is assumed the vessel arrived with 60,000 barrels of ballast and that all ballast

Fig. 3

Fendering Requirements



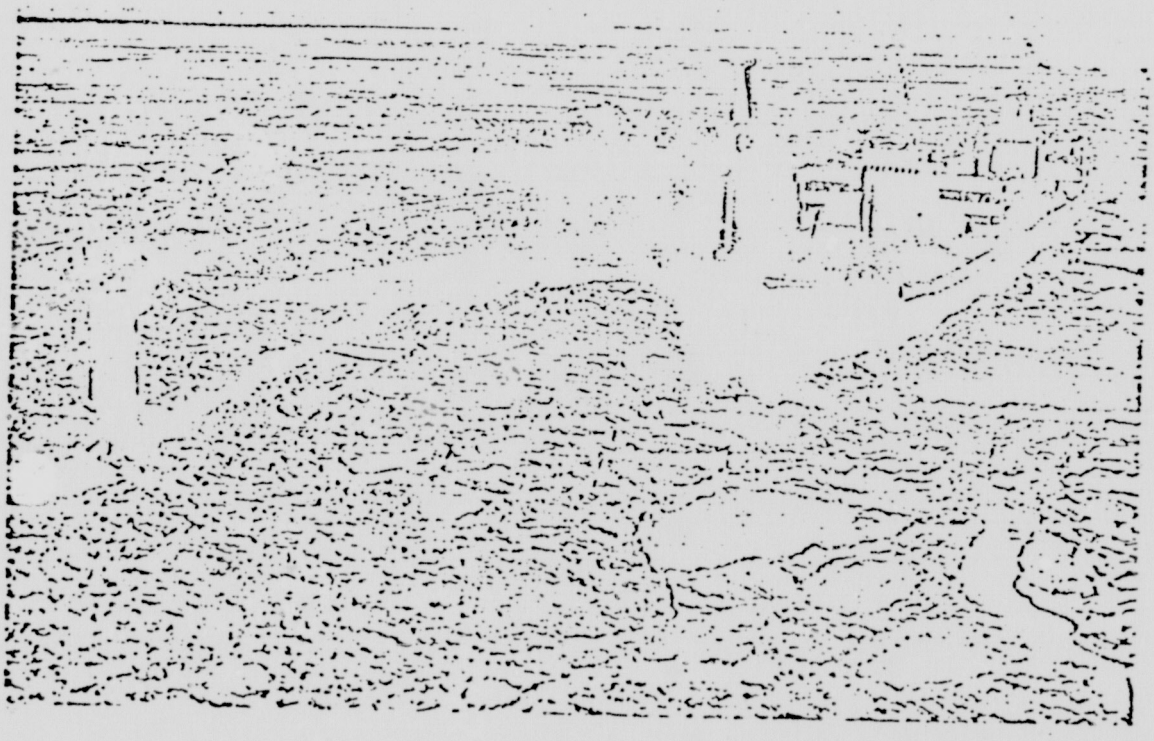
was discharged prior to taking on crude cargo. The seventeen hour turnaround period consists of one hour of docking and securing vessel, six hours of deballasting, nine hours of cargo loading and one hour for securing lines and leaving the dock. In general, fendering is required for some portion of the vessel's hull between the water line and the structure it is breasting against. It will be noted from Figure 3 that approximately 29 feet of the vessel's hull or freeboard is exposed at the beginning. As the loading cycle continues to the low water slack period the freeboard increases to approximately 35 feet due to discharge of ballast. This demonstrates that with a ten foot high fender unit maintained at an elevation whereby bottom of fender is two feet above water line, then the total vertical area requiring fendering sometime during the loading cycle is between elevation plus two feet and plus 32 feet with respect to mean lower low water. In reality, the extreme high and low tides must be considered when determining minimum fendering height requirements which for Drift River becomes more like 42 feet. The two foot clearance between water level and bottom of fender is an arbitrary operating condition whereas the ten foot fender height is a design feature. Both of these two criterias apply to the Drift River fender assemblies although considerable more latitude is available for clearance above water line at the starting of the loading cycle but this diminishes to zero as some vessels become fully loaded.

Contrary to the typical summer loading cycle just discussed, some Masters choose to maintain a deeper draft or trim condition when heavy ice is present. This is done to protect the rudder and propeller against ice damage and is accomplished by loading cargo before or simultaneously with deballasting operations. For this situation, the fendering area requirement is again different, thus further demonstrating the variable range involved. Because of these extensive fendering requirements and the fact that for a fixed system a large portion of the fendering would be subjected to ice loading, it was decided that some form of movable type fendering would have to be devised in order to minimize structures and maintenance.

Prior to discussing the actual design features used for the Drift River fendering system, it is essential to first review the other major environmental conditions natural to this site. It is these conditions which make Cook Inlet quite different to other tanker loading ports from both a design and operating standpoint. While revieweing these environmental conditions, I will also briefly cover the design criteria adopted for these items.

Typical Ice Floe Scene

Fig.4



78A

Ice formed in Cook Inlet is basically sea ice but there is always a considerable amount of fresh water ice present due to the many glacier fed tributary streams. Ice floes of one half to one mile across with a thickness of two feet or more are common at the Drift River site. The ice is not always in the form of flat floes for the extensive tide action in the upper inlet above the Forelands breaks the large floes into smaller pieces and causes considerable rafting of layers on layers that commonly attain heights of five feet or more. Wind also causes rafting particularly if there is a heavy concentration of small ice pieces. Other rafting conditions are caused by obstructions such as dolphin or platform caissons and even by a ship while it is either moored or moving through an ice floe. Whenever rafting conditions exist, there is a tendency for the sea ice to loose its salinity content by aeration action. This transformation is accelerated by the tide as it tosses the floes to and fro up and down the inlet. Figure 4 depicts a typical Drift River winter scene.

Although the purpose of a movable fendering system for the Drift River installation was primarily to allow the fendering system to be kept out of the ice zone thereby eliminating ice loading, it was subsequently determined that ice forces acting on the tanker while moored at the dock could be more prominent than docking impact forces. Thus, since the fender units were to be the media for transmitting forces acting on the moored tanker to the breasting dolphins, consequently ice forces still became the critical forces for the fender design. Ice criteria adopted for the fendering system was based on six inch thick ice effectively loading the entire length of a 30,000 DWT tanker. This type of ice loading is unusual for with the dock oriented parallel with peak currents ice loading normal to the hull of the vessel can occur only under certain combinations of current and wind conditions. In selecting this design ice criteria, a firm operating policy was established to safeguard against the catastrophic dangers of large floes acting normal to moored vessels which could crush the vessel's hull. A policy to leave berth when such potential ice conditions exist has been used successfully to date without unreasonable hardships or delays. The fender ice criteria just reviewed should not be construed as the ice criteria used for the main dock structures. A much more severe ice load is prevalent on the dolphin and platform caissons. Ice loading on these structures is even further compounded by the continual changing current directions causing loading from all directions. The design ice thickness for these structures was 42 inches.

79A

Perhaps you've heard of rocks that actually float; well, Cook Inlet has this strange phenomenon too. In this instance, though, it's not the rock characteristics that cause flotation; instead, it's simply ice action. There are several areas in the northern portion of the inlet where concentrated numbers of boulders are strewn along the beaches and mud flats - the Drift River area happens to be void of such. It's quite common to see these boulders moved about the shore line or completely disappear from sight. This migration of boulders, some weighing several tons or more, is brought about by ice forming on the boulder by successive tide actions until sufficient area accumulates for the whole mass to become buoyant. Once it reaches the floating condition, it then merely floats away with the current. Because of these strange happenings, one cannot be sure of boulder free beaches until spring breakup is over and then it's only a year-to-year proposition. If subsurface work is involved, consideration must be given to the possibility of encountering buried boulders for many have been deposited and silted in through the ages.

Before leaving the subject of ice, it should be understood that ice fails by direct compression around vertical caissons such as used in the Drift River dock structures. Equally important to remember is the relationship of horizontal ice forces with respect to floe velocity. Although it seems logical to expect maximum ice forces during peak current periods, actually just the opposite is the case as the greatest force is exerted on the structure when a steady slow motion exists. This latter condition is not just another phenomenon inherent to Cook Inlet; it's merely a function of ice crushing strength which decreases with increasing floe motion or impact against an obstruction.

Inlet water temperatures vary from around 48° F in the summer to 28° F in the winter. The mean annual ambient temperature is around 33° F whereas the recorded extreme minimum and maximum temperatures are minus 48°F and plus [illegible]° F respectively. To safeguard against the extreme cold temperature, a design temperature of minus 50° F was used for all dock structural components located above the mean lower low water line. Fortunately, the extreme subzero temperature periods are relatively short, usually lasting only several days. This undoubtedly influenced by the warmer waters in the inlet and the Gulf of Alaska. Consequently, winter temperatures around the immediate Cook Inlet area are much more moderate than the inland and arctic areas of Alaska. For that matter, the mean winter temperature is even more moderate than some of the northern states here in the lower forty-eight. Weather bureau statistics at the closest recording station to Drift River indicate a mean annual precipation of about 18 inches of rainfall and a

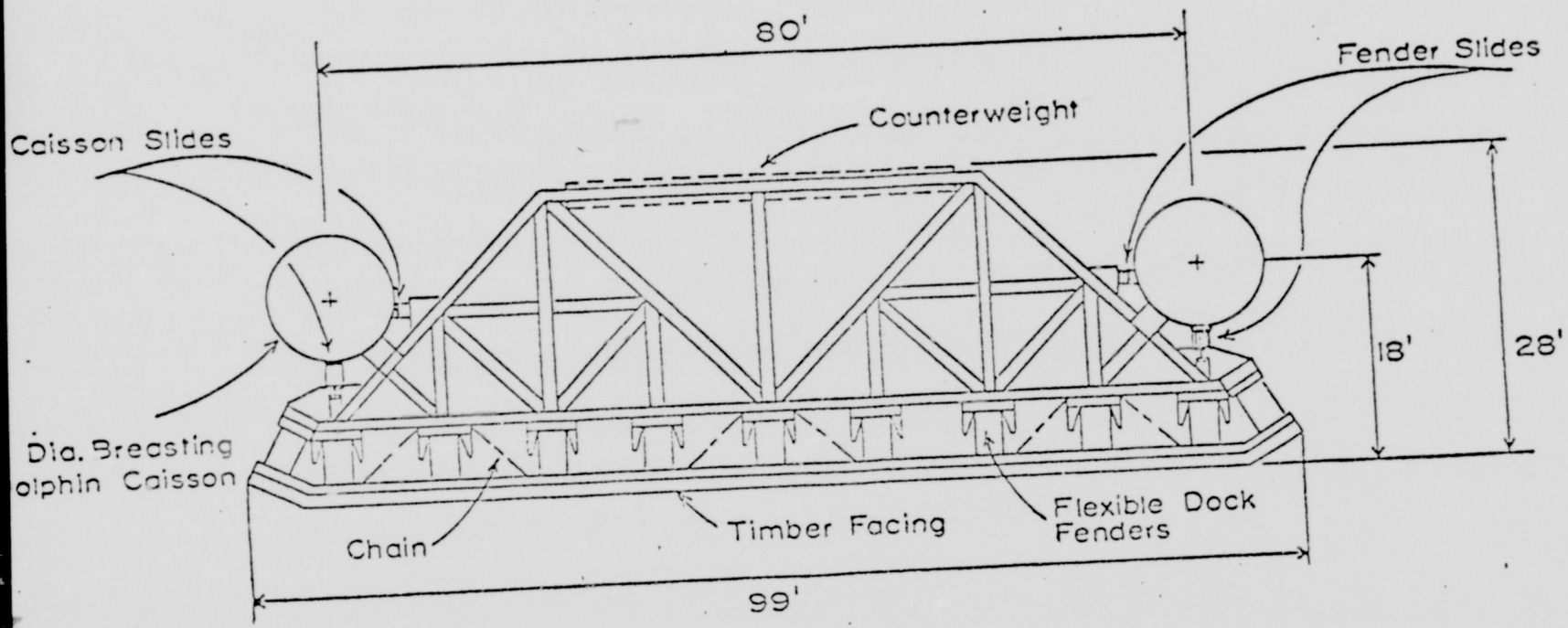
mean snowfall of around 62 inches. This weather data, however, is received somewhat skeptically by the Drift River terminal personnel because during the winter of 1966-1967 the terminal site was covered with snow to a depth of 12-15 feet on the level. Official rainfall figures likewise seem low when compared to actual experience since the site was first occupied for the initial construction work in April of 1966. The nearness of Mt. Redoubt, a 10,197 foot active volcano, some 25 miles from the terminal and the surrounding mountain range may have a significant effect on the weather at Drift River whereas these features may not be a factor at the closest U. S. weather station some 30 miles away on the Kenai Penninsula. A modern weather station has been installed at Drift River; however, its existence is still too new to establish historical data.

Wave conditions at the terminal site are generally minor, primarily because the only source for long fetches is from a southwestern direction. The orientation of the inlet plus the narrow channel and its adjacent shoal areas tends to further reduce the possibility of any major wave action being transmitted from the open seas. Because of these reasons, a rather moderate eleven foot design wave height was selected. From an operations standpoint, swell conditions are of more concern than wave action in Cook Inlet as storm swells can be rather severe and are known to develop quite suddenly. This condition is due to the storm track created by two quite differnet air masses, one being the colder continental air mass to the north and the other the warmer maritime air mass to the south. The prevailing wind direction is from the northeast or mostly parallel with the inlet whereas cross winds are harnessed by the mountain ranges and thus of much less intensity. Maximum wind velocity is approximately 75 MPH.

Peak tidal currents at the terminal site generally range between 3 and 5 knots although speeds of 6 knots have been reported in this area. Usually, the ebb current is slightly greater than the flood current, due to the addition of runoff water from Drift River and the other tributary streams. Even greater currents of up to 8 knots have been reported in the area immediately south of Forelands. At times, the current directions appear to have a dominant pattern of rotation and phase of occurrence within the tidal cycle. The direction of rotation beginning at slack tide periods is generally clockwise for both flood and ebb tides. But then at other times, with apparently similar tide condition the current rotation and time duration are not necessarily the same. The average directions toward which the peak currents flow was measured to be 034° T for flood currents and 208° for ebb currents or a difference of 6° from being 180° in opposite directions of each other. A dock orientation of 035° and 215° was

Fig. 5

Plan of Fender Assembly



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chosen as the mean of the average peak currents. There are occurrences where currents of one knot and greater occur at 90° to the face of dock. During these times, special precautions must be taken if docking operations are in progress or if ice prevails.

Another environmental condition which will be of general interest is the seismic aspects. Although seismic conditions were not direct factors in the fender design, they were certainly a critical part of the overall dock structure design. Alaska lies in the circum-Pacific semsic belt where the frequency of earthquakes is quite high. The destructive 1964 earthquake caused significant displacement of the earth's crust over a broad area of south central Alaska. Upthrusts have been measured at nearly 40 feet on Montague Island in the Prince William Sound region, approximately 150 miles east of Cook Inlet. Sizeable subsidences in the range of five feet or more were also experienced at several locations over a broad area including the inlet.

This concludes a review of the major environmental conditions prevalent to the Drift River site and highlights some of the more major design criteria established for these conditions. As previously stated, it was decided that a moveable type fendering system which would span the 80 foot spacing between the front two caisson legs of each breasting dolphin was considered the most suitable arrangement. The detail fender design work was contracted to Bechtel Corporation of San Francisco, California who retained John Blume and Associates, also of San Francisco for the structural design, and Professor Harold Payton of the University of Alaska for ice criteria. The final design was chosen after an extensive review of the expected forces, the desired operating features, the availability of materials and equipment, and required fabrication and field erection procedures. Understandably, the final design was somewhat sophisticated requiring special materials and equipment.

Each of the two fendering assemblies are approximately 98 feet long, 10 feet high, 28 feet deep and weigh approximately 150 tons. The double horizontal trussed units fabricated of low temperature steel have a front interfacing consisting of two rows of eleven flexible dock fenders. These flexible dock fenders are constructed of a special elastomer designed to withstand large berthing loads at extremely low temperatures without permanent distortion or other damage. The outboard ends of the flexible fender units are connected to a steel frame to which is mounted a 12" x 12" timber facing for the full length of the fender assembly. Concrete counterweights are installed on the top and bottom inboard trusses for stability purposes. A plan view of the fender assembly is shown in Figure 5.

Slide bearing plate assemblies are attached at each end of the fendering unit to provide a contact surface at the front and near the inside quarter point on the four front breasting dolphin caissons. The caissons are also fitted with slide bearing plate assemblies mounted vertically to the caissons that run the entire length of fender travel. Resilient type, reinforced rubber sandwich units are installed in the inner fender slide bearing assemblies to maintain pressure contact between the fender slides and the caisson slides. The inner fender slide bearing assemblies also are equipped with steel keeper plates to prevent the fender assembly from swinging out away from the caissons. Slide bearing surfaces are an important part of the fender structure much more than just a contact surface for the fender to ride up and down the caissons on as this is the point where forces exerted on the fender structure are transmitted to the breasting dolphins.

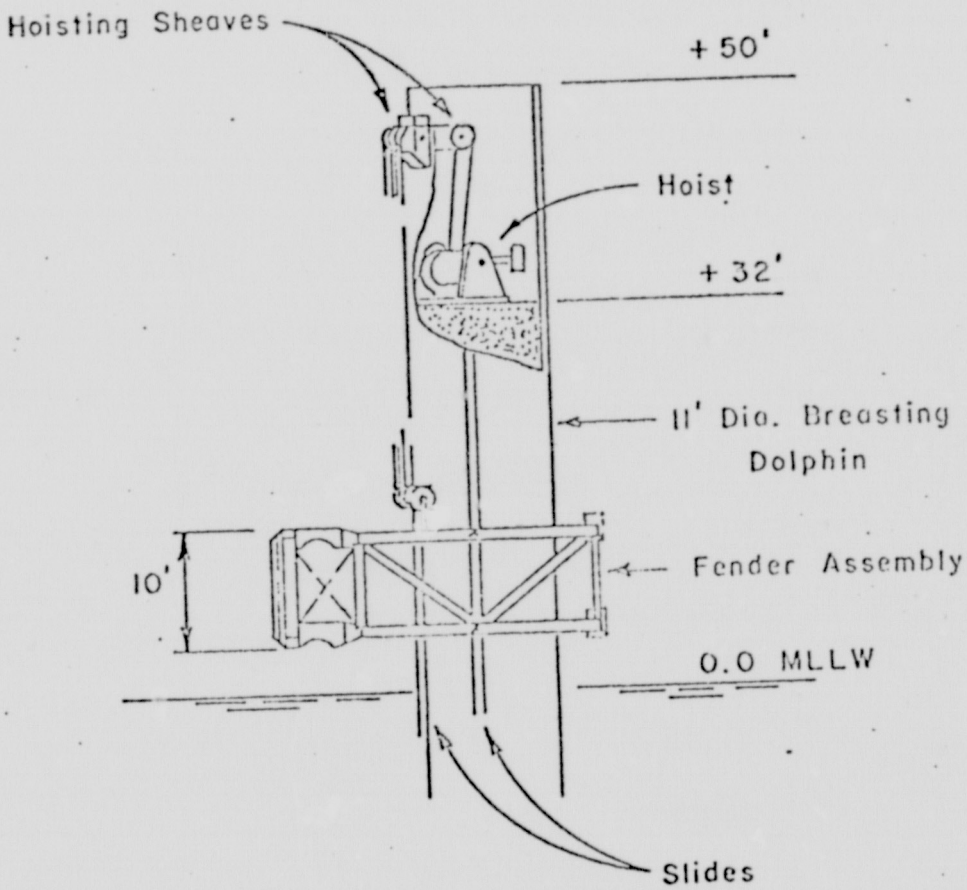
Originally, the slide assemblies included a coating of plastic material bonded to stainless steel backup plates welded to both the fender and caisson slide plates. This material has since been removed. The purpose of the plastic coating was to reduce the friction factor and ice accumulation; however, experience has proven that a metal to metal surface periodically greased works satisfactorily. It has also been determined from actual experience that any ice accumulations on the slide assemblies is of no consequence for it is quickly broken off by the fender slide action once the fender is moved.

The fendering units are moved vertically by a hoisting system housed in each of the four 11 foot diameter breasting dolphin caissons. Access to the hoist assembly is provided through a manhole on the top of the caissons and a fixed interior ladder that extends 18 feet to the hoist base. Each hoist is driven by an electric motor that is equipped with a spring loaded d.c. activated disc type brake. The individual 48" diameter hoist drums are connected to a double five part line system with guide sheaves installed near the interior top of the caissons, a fixed upper sheave block on the exterior top of the caissons and a lower sheave block which is pinned to the top of the fender assembly at each end. Figure 6 shows an elevation of the fender hoisting assembly. Another concern during the design stage was the possible buildup of ice on the hoist lines and sheaving assemblies. This has proved not to be a serious operating problem as again the weight of the fender unit quickly breaks up the ice buildup.

In discussing the design features of the fender truss, it was mentioned that low temperature quality steel was used. All steel members were required to conform to ASTM A537 Grade A specifications having an average impact value of 25 foot -lbs. at minus 50° F. Fabrication and welding specifications were generally in accordance

Fig. 6

FENDERING HOISTING ASSEMBLY



to Section VIII of the ASME Boiler and Pressure Code. Each fender unit was fabricated into four main sections to alleviate transportation problems that would have been involved with a single piece assembly. The four main sections and related appurtenances were bolted together at the Port of Anchorage then barged to the dock site for final installation. Properly sized structural steel members of low temperature grade steel were not available commercially; therefore, these members had to be fabricated from flat plate which added appreciably to the fabrication time.

Fendering height is controlled manually from either of two control station sites. A control station is located outside on the walkway near each inboard breasting dolphin caisson and a second control point is located in the control tower on the central platform. The two hoisting motors on each fender unit are synchronized and operated from a single switch. Separate control is also provided on each outboard hoist to adjust fender trim if needed at the outside control stations. Hoisting and lowering of the fender units is performed under power at all times. Mechanical and thermal overload status is monitored throughout the operating cycle from the control tower.

Between the first tanker loading on November 5, 1967 and mid-February of this year, 165 vessels were loaded at Drift River. Present operations average one docking every 48 hours for a range of ship sizes varying from 12,000 DWT to 50,000 DWT. With the exception of the first few dockings and the occasional first trip runs made by a few vessels after the startup period, the dockings have been made without tug assistance. This type of docking operation requires experienced marine personnel and a structurally sound fendering system. Normally, the docking is done during slack tide conditions when current is not a factor; however, with the limited slack tide periods this becomes a real scheduling problem. Tide tables must be continually adjusted for special weather conditions and during ice seasons careful watch must be taken. The average slack tide period is approximately 30 minutes; although this does vary slightly betwen flood and ebb. Current observations are also a critical part of dock operations. Special care must be taken in correlating surface current conditions with the tide time cycle for the current direction at lower water depth can be running quite differently than at the surface again making unattended tug docking difficult.

The movable fendering system has proven to be a practical installation for the Cook Inlet ice conditions. This particular concept may not be new but its use in this form, size and environment makes it a novel disign for the Cook Inlet area.

Exhibit "B" 86A

March 7, 1975

Mr. John Murray Reynolds
17 Battery Place
New York, New York 10004

Mr. Arthur E. Ferris
47 Winchester Drive
Manhasset, New York 11030

Capt. George T. Stam
c/o Bunge Corp.
One Chase Manhattan Plaza
New York, New York 10005

Re: S/S BENNINGTON
Arbitration
Our File: 230,853

Dear Sirs:

The captioned arbitration apparently has proceeded from the brief writing stage to the letter writing stage, and we are in receipt of a copy of Messrs. Kirlin, Campbell & Keating's letter dated February 27, 1975.

Owner's attorneys comment on charterer's inability to produce the pipeline company's records as to other incidents, etc. If the entire Pacific Fleet went down in Drift River a week before, it would have no bearing on the ice conditions present when the BENNINGTON was proceeding to and at the loading platform.

Owner's attorneys quote a portion of the information contained in U. S. Coast Pilot 9 submitted by charterer, such portion dealing with the head of Cook Inlet and the use of icebreakers at that location. The complete information furnished in U. S. Coast Pilot 9 clearly sets forth the ice conditions and tide conditions for the entire inlet that would be anticipated in proceeding to and at the location of the loading platform.

Owner's attorneys comment on the fact that excerpts from the 1974 Annual Supplement of U. S. Coast Pilot 9 were submitted. No 1968 or 1969 Annual Supplement was available, but the 1974 Supplement cites the Notices to Mariners issued in prior years, including the location and details of the Drift River terminal contained, not only in the notice to mariners referred to by owner published April, 1969, but to such notice issued prior thereto.

87A

Owner comments that when inquiry was made as to ice conditions, the platform personnel did not launch a helicopter. A better suggestion would seem to have been for the BENNINGTON'S master to look outside his window.

Very truly yours,

MENDES & MOUNT

By: John J. Sullivan

JJS:dc
cc: Kirlin, Campbell & Keating
120 Broadway
New York, N. Y. 10005
Att: Harold V. Higham, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHAS. KURZ & CO., Owners of the S/S BENNINGTON,

Petitioner,

and

UNION OIL COMPANY OF CALIFORNIA,

Respondent.

REPLY AFFIDAVIT

75 Civil 2764 (KTD)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN J. SULLIVAN, being duly sworn, deposes and says:

This affidavit is submitted in opposition to the motion of petitioner to confirm the arbitration award, and in reply to petitioner's affidavit in opposition to respondent's motion to vacate the arbitration award.

1. Petitioner asserts that respondent's second, third, fourth, sixth and seventh grounds for vacating the award are "re-arguing the facts and testimony that were presented at the several hearings before the panel", (Petitioner's Reply Affidavit, p. 2). This is not the fact. The grounds are directed at the award, (and not the facts and testimony), in that the award granted a recovery for damages unrelated to the basis specifically stated in the award, for charterer's liability, (i.e., "violation of the Safe Berth Clause in the charter party"), and arising away from the "berth", despite a specific holding of no liability for damages away from the berth, (i.e., "the panel proposes to reduce owner's claim by 10% to allow for some damage en route up river to the dock"); the award held charterer liable for a violation of the "Safe Berth" warranty, in manifest disregard of the conceded absence of the legal basis for such liability (i.e., "the failure to furnish [the master] with the pertinent provisions of the charter is indeed surprising"); the award held charterer

liable for the presence of ice in manifest disregard of the inference made by the courts, and by the majority of the arbitrators here, that this was in the contemplation of the parties, i.e., "Everyone knew she would encounter some ice if she was sent to Drift River in January"; the award implied a condition or qualification to the contract at variance with the unambiguous, explicit terms of the charter party, i.e., "master's judgment shall control as to whether or not vessel proceeds in Nikiski or Drift River"; and the award precluded charterer from submitting proofs or argument as to an issue, proposed for the first time in the award, after hearings were concluded and briefs submitted, by implying a condition or terms to the charter party, i.e., "the majority of the panel feel that the wording in Clause No. 53 implies that the vessel is to go through ice if it seems practical . . . ", (pp. 16-23).

2. As to the ground asserted for vacating the award, in that the award was rendered after the time provided for under the applicable rules had expired, petitioner states "This would not constitute grounds for vacating the award under Title 9 and prior decisions of this court", (Petitioner's Reply Affidavit, § a) on p. 2). The Rules of the Society of the Maritime Arbitrators, Inc., to which by agreement, the arbitrators are bound, set forth the conditions under which the present arbitration was conducted. The arbitrators failed to conform to those rules in rendering the award after the time required. The parties may properly spell out the conditions under which the arbitration is conducted and the limits of arbitrators' authority. Where the arbitrators breach the conditions, they have exceeded their power, and there are clear grounds under Title 9 and prior decisions of this court to vacate an award where arbitrators "exceed their powers".

The exchange of letters between counsel, following the submission of final briefs, (discussed under (b) on p. 2 of Petitioner's Affidavit), in no way effects the obligation assumed

by arbitrators to render an award "in no case later than 90 days from the receipt by arbitrators of the last evidence, transcript or brief . . . ". Arbitrators were in receipt of the "last evidence" at the time of the final hearing on December 17, 1974, and the last "transcript" shortly thereafter. At the time of the final hearing, arbitrators set forth the conditions for the submission of briefs and answering briefs by attorneys for the respective parties. This was done -- the last "brief" was submitted on or about February 25, 1975. Then, on February 27, 1975 counsel for owner sent an unsolicited letter to the arbitrators, (Exhibit VI annexed hereto), and attorneys for the charterer responded thereto, noting that the "arbitration apparently has proceeded from the brief writing stage to the letter writing stage . . . ". The time for arbitrators to render their award commenced to run when the last brief was submitted. The applicable Rules make no provision for a "last letter". If they did, anyone could keep open the time for the rendering of an award through all eternity by the simple device of writing an unsolicited letter to the arbitrators.

As to Point (c) on p. 2 of the Petitioner's Reply Affidavit, respondent was "prepared" to waive the time limitation, (Exhibit IV, Respondent's Affidavit in Support of Cross-Motion), but as petitioner notes, "that was not necessary as the arbitrators all met and came to a conclusion".

Also, at page 2 of Owner's Reply Memorandum of Law, an excuse is suggested for the delay in rendering the award in that "there has been a period of time when one of the arbitrators appointed by the charterers was hospitalized". The fact is the matter just dragged on and on. There were three relatively short hearings, (Owner's Petition, Paragraph 5), and thereafter, a meeting of arbitrators, that extended over one and one-half years. The charterer did not contribute to the delay -- "The defense did

not present any witnesses or evidence", (Award, p. 2), although this did not deter the majority of arbitrators from awarding interest for this period. The difficulty in agreeing on a date when arbitrators could meet apparently was that the Chairman only came to New York a few days a week, and owner's arbitrator was absent in Florida. Finally, on March 26, 1975, a meeting of the panel was scheduled for April 29, more than a month later, (Exhibit VII, annexed hereto). The arbitrator, Mr. Stam was hospitalized before April 29, but left the hospital in time for the April 29 meeting.

3. Respondent's further ground for vacating the award is not that the Chairman of the present panel, who was named by the arbitrators selected by owner and charterer, "had served on a panel involving other parties and other issues but by coincidence, involved a vessel at Cooke Inlet", (Petitioner's Reply Affidavit, p. 3). Respondent's objection is that it also involved the same loading platform that the Chairman here held to be an "unsafe berth". Petitioner states "nothing in the award of the other case . . . . indicates that the same terminal was involved", while carefully avoiding any suggestion that it was not involved. Deponant is advised the vessel proceeded to the loading berth here held to be "unsafe". It is not "shocking" for an arbitrator to have "preconceived ideas", and, in fact, respondent does not claim he did. However, respondent asserts the facts that might give rise to preconceived ideas should have been made known. This is a "circumstance" which clearly should have been disclosed under the Rules governing the arbitration.

Petitioner notes respondent neglected "to mention that the panel viewed a color motion picture film taken by the pilot on the voyage in question showing the loading facility and the vessel and the terrible ice conditions", (Petitioner's Reply Affidavit, p. 3), "we docked under", (Pilot's deposition, p. 31, ll. 11-25), thereby deliberately and needlessly exposing the vessel

to damage by ice, for to mention this would, of course, be to "reargue the facts and testimony".

4. In Owner's Reply Brief, it is stated "three bases were presented evidencing the jurisdiction of this court to so confirm the award and make it a judgment of the court. The charterers have apparently conceded the validity of these three bases . . . ", (Reply Brief, p. 1). It is not too clear what petitioner's point is, but it should be noted various details were agreed on at the time of the first hearing. It was agreed the arbitration would be conducted pursuant to the Rules of the Society of Maritime Arbitrators, Inc., (Exhibit VIII annexed hereto). Also, petitioner states the parties "entered into a charter party by which respondent warranted a safe berth on the merits the law is clear that in this day and age a charterer's warranty of a safe berth is absolute", (Petitioner's Reply Affidavit, p. 2). The warranty may be absolute, but not if it is modified. At the outset of the present dispute, petitioner furnished respondent with an opinion by petitioner's counsel, Messrs. Krusen, Evans and Byrne, dated February 3, 1969, stated in part:

> "Liability in this case must be determined under the 'Safe Berth' Clause, except to the extent that it is modified by the Ice Clause." (Emphasis added.)

Here, the warranty was not absolute, and respondent denied the vessel "was damaged by reason of the wrongful direction of the charterers to proceed to an unsafe loading berth and port". Petitioner's reliance on the effect of the Ice Clause was confirmed at the outset of the first arbitration hearing:

> "MR. SULLIVAN: . . . . . It is the charterer's position that the Ice Clause of the charter party (here) controlled.
>
> MR. REYNOLDS: That is part of your defense?
>
> MR. SULLIVAN: Yes . . . " (p. 5)(Exhibit IX, annexed hereto).

In the award, arbitrators note the Ice Clause as being one of "The two clauses in the charter party particularly bearing on the dispute", (Award, p. 2), and that:

> "The charterer based his defense on Clause No. 53, (the Ice Clause) . . . (Award, p. 2).

Owner's counsel confirmed the "Safe Berth" Clause did not stand alone, noting in his opening statement at the first hearing:

> "MR. SOMMER: . . . . The charter party, which is of course the agreement between the two parties, contains two clauses which I am sure you gentlemen will peruse more thoroughly than right now, but the one that I call to your attention is Clause 28, which deals with the safe berth and, finally, the Ice Clause which is a Clause 53.
>
> I am directing you particularly to the Ice Clause since I know you gentlemen know what a Safe Berth Clause is . . . " (p. 9) (Exhibit X, annexed hereto.)
>
> * * * *
>
> MR. SULLIVAN: Basically our emphasis, as indicated, will be directed to the fact that well aware of the ice conditions, that the pilot nevertheless proceeded into them and under these circumstances, that the Ice Clause of the charter party will control and that under the provisions of the Ice Clause, the charter should not be held liable.
>
> MR. SOMMER: That is the issue . . . . " (p. 13) (Exhibit XI, annexed hereto.)

The "Safe Berth" warranty was not "absolute", but was modified by the Ice Clause of the charter party.

It is respectfully submitted that the cross-motion of respondent should be granted.

Sworn to before me this

20th day of July, 1975.

COPY

KIRLIN, CAMPBELL & KEATING
ONE TWENTY BROADWAY
NEW YORK, N.Y. 10005

94A

Exhibit VI

February 27, 1975

78224

Mr. John Murray Reynolds
17 Battery Place
New York, New York 10004

Mr. Arthur E. Ferris
47 Winchester Drive
Manhasset, New York 11030

230763

Capt. George T. Stam
c/o Bunge Corp.
One Chase Manhattan Plaza
New York, New York 10005

Re: S.S. BENNINGTON
ARBITRATION

Dear Sirs:

We are in receipt of charterer's answering Memorandum, together with a copies of the only documents the charterers have submitted in this matter. We feel that some comments should be made to the Panel on these documents.

Apparrently, the reason why the charterers have not submitted documents or provided any evidence at all concerning their berth at Drift River Terminal is because counsel could not obtain any such information. The Panel, of course, is free to draw any inference it wishes.

With respect to those documents submitted, we wish to call the Panel's attention to pages 3a through d which are a general description of the Cooke Inlet area. It should be noted that none of these pages refer specifically to the berth at the Drift River Terminal. It states in part:

> "During a severe winter or after a considerable period of severe cold, full-powered vessels could probably reach the head of the inlet, but because of the heavy masses of ice floating in the strong currents, would find it impracticable to dock without the aid of an icebreaker."

The Panel will recall that the BENNINGTON arrived at the loading platform in January of 1969, and that the platform is <u>not</u> located at the head of the Inlet. In addition, it would seem that were an icebreaker necessary to assist the BENNINGTON in docking, at Drift River Terminal, the pilot, who knew the area, would have called for one. It also appears that the encouraging words of the personnel at the platform would have belayed any contemplation that the assistance of an icebreaker was required.

We also wish to call the attention of the Panel to page 4a of the documents submitted by the charterers which was published by the United States Coast Guard in the January 1, 1974, repeat 1974 Supplement to United States Coast Pilot 9 which is some 5 years after the incident in question. This appears to be the first time that this publication dealt at any length with the Drift River Terminal.

The Notice to Mariners referred to as "NM-15/2150/69", a copy of which is attached, published in April of 1969, shows that the terminal owners, one of whom is this charterer, now provides lights to define the extremeties of the terminal facilities. It made no mention of what precautions were taken to ensure the safety of vessels docking there.

We also call your attention to page 4a of charterers documents which states in part:

> "...a helicopter deck,..are on the platform."

The panel will recall that no such facility, which may have aided the BENNINGTON in January of 1969 by providing information as to ice conditions, further away than the nine miles the platform personnel could see down the channel- was not available. It is open to inference that as a result of the experience of the BENNINGTON and other vessels, this service was provided.

Charterers documents are damaging to charterer.

Very truly yours,

KIRLIN, CAMPBELL & KEATING

By _____
Harold V. Higham

HVH:yc

cc: Mendes & Mount
Attention: John J. Sullivan, Esq.

97A

Exhibit VII

March 26, 1975

Capt. George T. Stan
Bunge Corp.
One Chase Manhattan Plaza
New York, N. Y. 10005

BENNINGTON
Arbitration

230863

Mr. Arthur E. Ferris
47 Winchester Drive
Manhasset, New York 11030

Gentlemen:

With reference to our letter dated yesterday regarding the arbitration above, I regret that I was mistaken in my belief that the April 29th date was for an actual hearing. In fact, it is simply a meeting of the arbitrators and was not intended for the letter to be addressed to the attorneys involved.

The date remains as previously stated.

Very truly yours,

John M. Reynolds

JMR:RF
CC: Messrs:
John J. Sullivan
Hendes & Mount
27 William Street
New York 5 N. Y.

Richard H. Sommer
Kirlin, Campbell & Keating
120 Broadway
New York, N. Y. 10005

RECEIVED
MAR 27 1975
M. & M.
Answered

98A

So, I have had business dealings with both of them but I am semi-retired now. I have no business dealings with them at the present time and no connection with them.

MR. STAM: Unless a certain arbitration involving either or both of these principles, I do not think I ever had any dealings with either of them.

MR. REYNOLDS: That does not count as a business dealing. Are both Counsel agreeable this arbitration be conducted under the Society of Maritime Arbitrators? Yes. Do you wish the arbitrator sworn?

MR. SOMMER: We will waive it. The arbitrators are naturally concerned about payment of their fees to the sum.

MR. REYNOLDS: Are you gentlemen in position, on behalf of your principls, to guarantee the arbitrator's fees?

MR. SOMMER: Yes, we are.

MR. SULLIVAN: Yes.

MR. REYNOLDS: We have a submission agreement here which we had sometime ago which I assume is still in effect, signed by Mr. Rop (phonetics),

an improper port and berth.

MR. SOMMER: I think it is clear that in denying it, that you have a different version of what occurred. I don't think there is any problem there.

MR. STAM: This is, of course, your defense. The question is do the charterers have a counter-claim against the owners.

MR. SULLIVAN: No counter-claim. It is the charterers position that the ice clause of the charter party were controlled.

MR. REYNOLDS: That is part of your defense?

MR. SULLIVAN: Yes. I was just concerned in that it wasn't spelled out in the submission agreement.

MR. SOMMER: Yes, just that we have no misunderstandings here, there are, I believe, not only no counter-claims but certain other claims which may be apparent. Let's say dead freight or detention time and all that. The parties have resolved these difficulties. In other words, the charter, I think, extended the charter for a couple of years and made some kind of arrangement. So, except to the issue of the damage to the vessel, caused by ice, there are no other issues before you

the most severe and heavy ice conditions, I think, that were experienced. The vessel had to go astern. Almost the entire time, inorder to stay at the platform, and during this time, she sufferred considerable damage. She was holed, her plates were indented and owners will show the arbitrators by photographs and films the conditions and, of course, repairs had to be made. What this is all about is that owners want the cost of the repairs from the charterers. The charter party, which is of course the agreement between the two parties, contains two clauses which I am sure you gentlemen will peruse more thoroughly than right now, but the one that I call to your attention is clause 28, which deals with the safe berth and, finally, the ice clause which is a clause 53.

I am directing you particularly to the ice clause since I know you gentlemen know what a safe berth clause is. The facts as owners will show, w that the pilot was willing and did take the vessel into Drift River. The charterer never asked to be diverted to another port and that the ice conditio at the time the vessel proceeded thereto, were not apparent. That there wasn't any difficulty until

indicated, will be directed to the fact that well aware of the ice conditions, that the pilot nevertheless proceeded into them and under these circumstances, that the ice clause of the charter party will control and that under the provisions of the ice clause, the charter should not be held liable.

MR. SOMMER: That is the issue. I think we would like to go on since we have Mr. Webber here today. Taking it, perhaps, not in correct order with that portion of it, but at least we want to get to his portion of this case and if you like to swear the witness, we will go ahead and put him on.

THEODORE D. WEBBER, residing at 14071 Shirley Street, Westminster, California, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY

MR. SOMMER:

Q Will you tell us your name, please?

A Theodore D. Webber.

Q By whom are you presently employed?

A Keystone Shipping Company.

Q What is your position with Keystone Shipping?

102A

MENDES & MOUNT
27 WILLIAM STREET
NEW YORK, N. Y. 10005

CABLES
"MENMOUNT"

TELEPHONE
DIGBY 4-7100

July 8, 1975

Honorable Kevin Thomas Duffy
United States District Judge
United States Courthouse
Foley Square
New York, N. Y. 10007

Re: Chas. Kurz & Co., Owners of the
S/S BENNINGTON and
Union Oil Company of California
75 Civil 2764

Dear Judge Duffy:

We represent Respondent Union Oil Company of California on the cross-motion in the captioned matter to vacate the award of arbitrators. The motion, initially returnable on June 24, 1975, had been adjourned to July 8, 1975.

Petitioner's affidavit and memorandum in opposition to Respondent's cross-motion was served on July 3, 1975, and a reply affidavit and memorandum was prepared by us on behalf of Respondent. Thereafter, attorneys for Petitioner served an amended affidavit and memorandum on the afternoon of July 7, 1975.

Petitioner's amended affidavit and memorandum are generally the same as those initially served. However, it should be noted that comment is made, in the first full paragraph on page 2 of Respondent's reply affidavit, to the statements contained in "(Petitioner's Reply Affidavit, § a) on p. 2)". That comment now applies to the last sentence of the second full paragraph on page 2 of Petitioner's affidavit.

Comment is made, at the bottom of page 2 of Respondent's reply affidavit, to the statements "(discussed under (b) on page 2 of Petitioner's affidavit)". That comment now applies to the third full paragraph on page 2 of Petitioner's affidavit.

Comment is made, in the first full paragraph on page 3 of Respondent's reply affidavit, to "point (c) on p. 2 of the Petitioner's reply affidavit". That comment now applies to the fourth full paragraph on page 2 of Petitioner's reply affidavit.

9

Also, the second full paragraph on page 4 of Petitioner's reply memorandum was initially set forth as a quotation, and Respondent refers to this as a quotation on page 6 of its reply memorandum. The statement in Petitioner's amended memorandum is no longer in quotes.

Exhibit A, annexed to Petitioner's affidavit, an article by a "pipe line planning associate, Mobil Oil Corp.", not a party to the present dispute, was not attached to Petitioner's initial affidavit, and has nothing to do with ice conditions encountered by the BENNINGTON at Drift River on the voya in question.

Respectfully,

MENDES & MOUNT

John J. Sullivan

By: John J. Sullivan

cc: Richard H. Sommer, Esq.
Kirlin, Campbell & Keating
One T enty Broadway
New York, N. Y. 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHAS. KURZ & CO., Owners of the S.S. BENNINGTON

Petitioner,

and

UNION OIL COMPANY OF CALIFORNIA

Respondent.

NOTICE OF MOTION TO CONFIRM ARBITRATION AWARD

KIRLIN, CAMPBELL & KEATING
Attorneys for Petitioner
ONE TWENTY BROADWAY,
NEW YORK, N.Y. 10005
(212) 732-5520

Copy Rec'd. 6-10-75

MENDES & MOUNT
27 WILLIAM ST.
NEW YORK 5, N. Y.
TEL. DIGBY 4-7100

The motion to confirm the arbitration award is granted.
SO ORDERED.

Kevin Thomas Duffy, U.S.D.J.

New York, New York
November 10, 1975

9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

105A

M/S. KURZ & CO., Owners of the S/S BENNINGTON,

Petitioner,

and

UNION OIL COMPANY OF CALIFORNIA,

Respondent.

COPY RECEIVED
JUN 18 1975
KERR, CAMPBELL & KENTON

CROSS
NOTICE OF MOTION TO VACATE ARBITRATION AWARD

HAYMES & MCCANT,
Attorneys for Respondent,
UNION OIL COMPANY OF CALIFORNIA
[illegible] William Street,
New York, N.Y. 10005
Tel. DI 4-7700

The motion to vacate the arbitration award is denied.

So Ordered.

Kevin Thomas Duffy, U.S.D.J.

New York, New York,
November 10, 1975

U.S. DISTRICT COURT
FILED
NOV 10 1975
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C6A

Judgt #-75,908

CHAS. KURZ & CO., Owners of the S/S BENNINGTON,	75 Civil 2764 (KTD)
Petitioner,	COUNTER PROPOSED ORDER AND JUDGMENT CONFIRMING ARBITRATION AWARD
-and-	
UNION OIL COMPANY OF CALIFORNIA,	
Respondent,	

U.S. District Court
Filed
Nov 18, 1975
S.D. of N.Y.

The Petitioner Chas. Kurz & Co., having moved to confirm the award of arbitrators dated May 20, 1975 annexed to the Petition herein, and the Respondent having moved to vacate the said award, and memorandum orders having been made on November 10, 1975 by Honorable Kevin Thomas Duffy, United States District Judge, granting the motion to confirm the award and denying the motion to vacate the award, it is accordingly

ORDERED that the said arbitration award dated May 20, 1975 be and is hereby confirmed, and it is further

ORDERED AND ADJUDGED that Petitioner Chas. Kurz & Co. recover from Respondent Union Oil Company of California the sum of $595,395.90 plus interest on this sum at 5% per annum from March 21, 1969 to February 15, 1975 as awarded, amounting in all to the sum of $771,241.63 with interest thereon according to law from the date the judgment is entered until paid.

Dated: New York, New York
November 7, 1975.

Kevin Thomas Duffy
U.S.D.J.

Judgment entered November 18, 1975

Raymond F. Burghardt
Clerk

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

CHAS. KURZ & CO., Owners of the S/S BENNINGTON,

Petitioner,

-and-

UNION OIL COMPANY OF CALIFORNIA,

Respondent.

75 Civil 2764(KTD)

NOTICE OF APPEAL

NOTICE is hereby given that Union Oil Company of California, respondent above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order granting petitioner's motion to confirm the arbitration award entered in this action on the 10th day of November, 1975, and from the order denying respondent's motion to vacate the arbitration award entered in this action on the 10th day of November, 1975, and the judgment entered on said orders on November 18, 1975.

Dated: New York, N.Y.
December 5, 1975

MENDES & MOUNT
Attorneys for Respondent

By _____
A Member of the Firm
27 William Street
New York, N. Y. 10005
344-7100